United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

29-2

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,076

JAMES J. TAGLIA,

Appellant.

v.

MELVIN R. LAIRD,
SECRETARY OF DEFENSE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX TO APPELLANT'S BRIEF

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Washington, D. C. THIEL PRESS 202 393-0626

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Docket Entries

No.	Date	Proceeding
3	March 22, 1966	Amended Complaint; C/M 3/21/66.
4	May 13, 1966	Answer of defendant to Amended Complaint; C/M 5/13/66; appearance Benjamin C. Flanagan.
10*	July 19, 1968	Motion of plaintiff for Summary Judgment; C/M 7-18; index to Exhibit A; copy of Stipulation; Exhibits A, A-1 through A-17; AA-1 through AA-4; AB-1; index to Exhibit D, D-6. * (Docket No. 10 in 643-66)
27	March 19, 1969	Reply of defendant to plaintiff's Opposition to Defendant's Motion for Summary Judgment; exhibit.
30	March 19, 1969	Order denying Motion of plaintiff for Summary Judgment and granting Motion of defendant for Summary Judgment (Signed, March 17, 1969, Gasch, J.).

[642-66, R.3]

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

1. This Court has jurisdiction by virtue of the provisions of Title 28, Sections 1346(a)2, 1361, 2201 and 2202, United States Code, and the Constitution of the United States.

2. Plaintiff, JAMES J. TAGLIA, now is and was at all of the times hereinafter mentioned, a citizen of the United States. He presently resides in the State of Georgia.

3. Defendant, ROBERT S. MC NAMARA, is now and was at all times hereinafter mentioned, the duly appointed and acting Secretary of Defense of the United States.

4. For a number of years prior to the 24th day of January, 1963, Plaintiff had been employed by firms or corporations which contracted with the United States to supply goods, materials and services to the Department of Defense, as a Sales Engineer. As such Sales Engineer Plaintiff represented these firms and corporations in their dealings with the United States, specializing in this aspect of their work. He had developed a knowledge and expertise in connection with such representation which enabled him to command a salary and position considerably more remunerative and beneficial than that of a Sales Representative or Engineer engaged solely in civilian activities. Essential to the performance of this type of activity by the Plaintiff was a right to access to information, otherwise classified by Defendant under the provisions of a Regulation denominated Department of Defense Industrial Security Manual for Safeguarding Classified Information and withheld from unauthorized persons by the Defendant under a Regulation denominated by the Defendant as the Indus-

trial Personnel Access Authorization Review Regulation. Plaintiff, during all times herein mentioned, held an Access Authorization granted by Defendant, which authorized him, in connection with his duties as a Sales Engineer, to have access to certain types of classified information up to and including that classified by the Defendant as "Secret".

5. On or about 24th day of January, 1963 the Plaintiff was employed by Melpar, Inc. to manage its Houston, Texas office, having shortly prior thereto severed his connections with the Philco Corporation, with whom he held a position as Sales Engineer in connection with its dealings with the United States, and in connection with which he held an Access Authorization to secret information of the United States, under the Regulations, aforesaid. The position which the Plaintiff held with Melpar, Inc. required him to continue his activities as a Sales Engineer in connection with that concern's dealings with the United States, and therefore, required that he possess an authorization from the Defendant to have access to classified information up to and including "Secret".

6. On or about the 24th day of January 1963, the Defendant purporting to act under the provisions of Executive Order 10501, dated November 9, 1953, 18 F.R. 7049, as amended by Executive Order 10816, 14 F.R. 3777, dated May 8, 1959, and Executive Order 10865, dated July 28, 1960, and under the provisions of the Access Authorization Review Regulation, aforesaid, issued by the Defendant, allegedly pursuant to the authority vested in the Defendant by the Executive Orders, aforesaid, suspended Plaintiff's Access Authorization to information of any kind classified by the Defendant. Subsequently Defendant, after a hearing as prescribed by the Regulation aforesaid, revoked Plaintiff's Access Authorization. By

reason of this action on the part of the Defendant Plaintiff was discharged from his employment by Melpar, Inc., and has been ever since and is now precluded from employment in his chosen field of endeavor, and has by reason thereof been deprived of a substantial property right in his chosen vor.

7. Defendant in suspending, and in later permanently revoking Plaintiff's Access Authorization to information classified by the Defendant, acted upon a report made to the Defendant alleging that the Plaintiff had been guilty of a technical violation of the Department of Defense Industrial Security Manual for Safeguarding Classified Information, aforesaid; a violation which did not in any way involve any criminal conduct nor any violation of the espionage laws of the United States.

8. In purporting to act under the provisions of the Executive Orders, aforesaid, and of the Regulations, aforesaid, promulgated by Defendant, the Defendant deprived the Plaintiff of his property rights in his chosen field of endeavor without due process of law in that:

(a) Plaintiff's authorization to have access to information by the Defendant was initially suspended without opportunity for any hearing whatsoever and without any valid administrative determination which, had the regulations been valid, would have justified a revocation.

(b) Defendant pretended to accord to Plaintiff a hearing, thereafter, while the suspension continued, and while the Plaintiff continued to be denied his property rights in his chosen field of endeavor, which hearing, however, was not in fact a due process of law hearing, in that

(1) The designated Hearing Officer, known as the Field Board, was an employee of the Department of the Air Force loaned to the De-

fendant, to conduct hearings, without any authority in law whatsoever to conduct and hold hearings.

(2) The Field Board or Hearing Officer designated to hold such hearings, had no power or authority to compel the attendance of witnesses; that is neither he nor the Defendant in these proceedings, had any authority to subpoena witnesses either for Plaintiff, or for the Defendant.

(3) The so-called Field Board, had no power whatsoever to administer oaths to witnesses appearing before the Board and was relegated to the necessity of "warning" witnesses that their testimony was subject to the provisions of Section 1001, Title 18, United States Code, a criminal statute having no reference to perjury.

(4) The so-called Field Board, had no authority to compel witnesses to answer questions, or to produce documentary evidence. In this case, this lack of authority denied to the Plaintiff the right to require his accusers to produce documentary evidence, which they refused to produce during the hearing, and to answer questions which they refused to answer during the hearing.

(5) While the Plaintiff was accorded the opportunity to argue his case before the so-called Hearing Board, he was denied the opportunity or right to examine the report or proposed decision of the Hearing Board, which was supplied to the "Central Board", the Board finally authorized by the Defendant's Regulations to grant, deny or revoke Access Authorizations. All that was accorded to the Plaintiff was advice from the "Central Board", that it proposed to issue an order permanently revoking his Access Authorization. He was then accorded the right to appear before that Board and argue his case, but without the benefit and advantage of the

report of findings of the Field Board. Thus the Central Board could have revoked his Access Authorization while the Field Board recommended to the contrary. In addition, the Central Board considered matters to which the Plaintiff had no access, as there was available to the Central Board documentary evidence that the witnesses refused to supply to Plaintiff during the hearing.

(6) The proceedings placed the burden of proof on the Plaintiff that he was not guilty of a technical violation of the Industrial Access Authorization Review Regulation, rather than on the Defendant, who sought to suspend and revoke a right already in existence.

(7) The Defendant had no substantive evidence to support the allegation of a technical violation of the regulation by the Plaintiff, and the Board, under the Regulation, was authorized to make a decision regardless of whether or not such decision was supported by substantive evidence.

9. Although Plaintiff believed that the Executive Orders and Regulations aforesaid, did not accord to him a due process hearing, he nevertheless went through the motions. He sought, and by legal action, forced the Defendant to supply him with a Statement of Reasons, and an opportunity for a hearing; he participated in a hearing on the question of whether or not the suspension then in existence should be made permanent; he filed a brief with the Hearing Board; he asked for and had a hearing before the Central Board; and in all other respects has exhausted any alleged administrative remedy which it could be claimed had been accorded to him.

10. That by reason of the conduct of the Defendant aforesaid, Plaintiff has been denied his property right, the right to employment in his

chosen field of endeavor, without due process of law. Until the Defendant restores Plaintiff's Access Authorization to information classified by the Defendant, up to and including "Secret", Plaintiff is and will continue to be unable to obtain employment in his chosen field of endeavor. The injury to Plaintiff is, therefore, irreparable and he is without adequate remedy at law.

WHEREFORE, the Plaintiff demands judgment

(a) Declaring the acts of Defendant in suspending and revoking Plaintiff's Secret Access Authorization to information classified by Defendant, illegal, void, null and of no effect.

(b) Requiring the Defendant to restore the Plaintiff's security clearance and Secret Access Authorization to information classified by Defendant as an employee of Melpar, Inc.

[642-66, R.4]

ANSWER TO AMENDED COMPLAINT

Now comes the defendant, the Secretary of Defense of the United States, by his attorney, and in answer to the amended complaint herein filed, says:

First Defense

1. The defendant admits that the Court has jurisdiction over this civil action.

2.-3. The defendant admits the allegations contained in paragraphs 2 and 3, inclusive, of the complaint, except that "Acting" should be "acting."

4. Answering the allegations contained in paragraph 4 of the complaint, the defendant alleges that as of January 24, 1963 plaintiff had been em-

ployed by Philco for approximately one year, he having commenced his employment with Philco in January, 1962; admits that plaintiff was employed by Philco as a Senior Technical Representative; and alleges that in 1956 plaintiff was granted a "Secret" access authorization. The defendant further admits that as a Philco employee plaintiff served as a representative of Philco in its contractual dealings with the Department of Defense. The defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third and fourth sentences of paragraph 4 of the complaint. The defendant denies the other allegations contained in paragraph 4 of the complaint.

5. The defendant admits the allegations contained in the first sentence of paragraph 5 of the complaint, except the allegation describing the title of plaintiff's position with Philco as to which the defendant alleges his belief that the title should be Senior Technical Representative. The defendant lacks knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 5 of the complaint.

6. The defendant admits the allegations contained in the first sentence of paragraph 6 of the complaint, except the characterizations "purporting" and "allegedly, which characterizations the defendant denies; the reference to the defendant as the suspending authority, which should be the Assistant Chief of Naval Material. The defendant admits the allegations contained in the second sentence of paragraph 6 of the complaint. The defendant lacks knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 6 of the complaint.

7. The defendant denies the allegations contained in paragraph 7 of the complaint. The defendant particularly denies plaintiff's characteriza-

8. The defendant denies that the plaintiff has been deprived of property rights without due process of law.

8(a). The defendant admits that plaintiff was not accorded a hearing prior to the suspension of his access authorization. The defendant denies the other allegations contained in paragraph 8(a) of the complaint.

8(b). The defendant denies the allegations contained in paragraph 8(b) of the complaint.

8(b)(1). The defendant admits that the hearing officer, also known as the field board, was an employee of the Department of the Air Force assigned to the Department of Defense to conduct hearings. The defendant denies the other allegations contained in paragraph 8(b)(1) of the complaint.

8(b)(2).-8(b)(3). The defendant admits the allegations contained in paragraphs 8(b)(2) and 8(b)(3) of the complaint.

8(b)(4). The defendant admits the allegations contained in the first sentence of paragraph 8(b)(4) of the complaint. The defendant denies the other allegations contained in paragraph 8(b)(4) of the complaint.

8(b)(5). The defendant admits the allegations contained in the first sentence of paragraph 8(b)(5) of the complaint; denies the allegations contained in the second sentence of paragraph 8(b)(5) of the complaint; admits the allegations contained in the third and fourth sentences of paragraph 8(b)(5) of the complaint; and denies the allegations contained in the fifth sentence of paragraph 8(b)(5) of the complaint.

8(b)(6). The defendant denies the allegations contained in paragraph 8(b)(6) of the complaint.

8(b)(7). The defendant denies the allegations contained in paragraph 8(b)(7) of the complaint.

9. Answering paragraph 9 of the complaint, the defendant admits that the plaintiff has exhausted his administrative remedies. The defendant lacks knowledge or information sufficient to form a belief as to the nature of plaintiff's beliefs as expressed in the first sentence of paragraph 9 of the complaint. The defendant admits that plaintiff filed suit on March 7, 1963 as alleged in the second sentence of paragraph 9 of the complaint, but alleges that the case became moot and was dismissed upon the issuance to plaintiff of a Statement of Reasons on March 21, 1963. The defendant admits the other allegations contained in paragraph 9 of the complaint.

10. The defendant denies the allegations contained in paragraph 10 of the complaint.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

The granting or denial of access to classified defense information is an Executive function and this Honorable Court has no authority to act in the stead of Executive officers in making such determinations.

WHEREFORE, the defendant, having fully answered the allegations contained in the numbered paragraphs of the amended complaint, prays that the amended complaint herein be dismissed, with costs taxed against the plaintiff.

[643-66, R.10] [Caption Omitted in Printing]

MOTION FOR SUMMARY JUDGMENT

Each Plaintiff herein, the captioned cases having been consolidated for the purposes of further proceedings herein, by his attorney, Robert Sheriffs Moss, upon

1. the pleadings herein;

2. the transcript of proceedings and testimony before Defendant's representative, the Washington Industrial Personnel Access Authorization Field Board, indexed as to dates and the case involved, and Government's Exhibit A, thereto, which are attached hereto and marked Exhibit A and Exhibit A-I respectively;

3. the Notice of Suspension, Statements of Reasons, and Answers of Plaintiffs upon which the proceedings aforesaid were based, which are indexed and attached hereto, and marked collectively as Exhibit B.

4. the applicable executive orders and regulations of the Defendant, attached hereto and marked collectively as Exhibit C;

5. the correspondence with and transcripts of argument before Defendant's representative, the Central Industrial Personnel Access Authorization Board, indexed and attached hereto, and marked collectively as Exhibit D; and

6. motions to reopen cases for purpose of obtaining possession of and consideration of the Poole letter and related correspondence, and correspondence with the Secretary of Defense

requesting reversal of the decisions, indexed and attached hereto, and marked collectively as Exhibit E; and

7. the statement of material facts as to which Plaintiff's counsel contends there is no genuine issue, annexed hereto;

moves the Court for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9 of the Rules of this Court, directing that summary judgment be entered in favor of each Plaintiff, and for such other and further relief as the Court may deem just.

Dated July 17th, 1968

[Caption Omitted in Printing]

INDEX TO EXHIBIT A --
TRANSCRIPT (ATTACHED)

NOTE: Attached hereto is the Stipulation under the terms of which separate proceedings were to be held in both the Taglia and Becker cases, excepting that testimony taken in the Becker case, applicable to the Taglia case, was to be considered as if taken on deposition.

Transcripts applicable to both cases under this caption:

WASHINGTON INDUSTRIAL PERSONNEL ACCESS
AUTHORIZATION FIELD BOARD

In the Matter of the Application for Access Authorization of LEO GEORGE BECKER	)	OSD 63-174
In the Matter of the Application for Access Authorization of JAMES JUDE TAGLIA	)	OSD 63-131

As follows:

1. Transcript for June 25, 1963, pp. 1 thru 49.
2. Transcript for July 8, 1963, pp. 1 to 209.
3. Transcript for July 9, 1963, pp. 209 to 450.
4. Transcript for July 10, 1963, pp. 450 to 694.
5. Transcript for July 11, 1963, pp. 694 to 768.
6. Transcript for July 12, 1963, pp. 768 to 987.
7. Transcript for July 17, 1963, pp. 987 to 1226.

8. Transcript for July 18, 1963, pp. 1226 to 1431.

9. Transcript for July 19, 1963, pp. 1431 to 1481.

10. Transcript for July 22, 1963, pp. 1481 to 1685.

11. Transcript for July 23, 1963, pp. 1685 to 1881.

12. Transcript for July 25, 1963, pp. 1881 to 2081.

13. Transcript for July 26, 1963, pp. 2081 to 2159.

14. Transcript for August 1, 1963, pp. 2159 to 2378.

15. Transcript for August 2, 1963, pp. 2378 to 2588.

16. Transcript for August 3, 1963, pp. 2588 to 2635.

17. Transcript for August 6, 1963, pp. 2635 to 2768.

Transcripts applicable to the Taglia case only under the caption:

WASHINGTON INDUSTRIAL PERSONNEL ACCESS
AUTHORIZATION FIELD BOARD

In the Matter of the Application for Access Authorization of JAMES JUDE TAGLIA	)	OSD 63-131

As follows:

A-1 Transcript for February 27, 1964, pp. 50 to 87*

A-2 Transcript for February 28, 1964, pp. 87 to 103

A-3 Transcript for March 2, 1964, pp. 103 to 201

A-4 Transcript for April 16, 1964, pp. 201 to 205

*The first 50 pages are in No. 1 supra.

Transcripts applicable to the Becker case only under the caption:

WASHINGTON INDUSTRIAL PERSONNEL ACCESS
AUTHORIZATION FIELD BOARD

In the Matter of the Application for Access Authorization of LEO GEORGE BECKER	)	OSD 63-174

As follows:

B-1 Transcript for April 16, 1964, pp. 2768 to 2772.

NOTE: Only one copy is being filed herewith and copies are not being served on Defendant. Defendant has the originals of the transcripts.

STIPULATION

WHEREAS the above-entitled proceeding has been set for trial on July 8, 1962: and

WHEREAS Counsel for the Department of Defense has moved the Field Board to consolidate the proceeding in this case with the proceeding in the case of James Jude Taglia on the principal ground that, as the Government does not have the power to subpoena witnesses, it may be difficult, if not impossible, for the Government to induce witnesses who are in a position to testify as to matters in issue in both of the cases aforesaid to testify twice; and

WHEREAS in the interest of permitting the witnesses to appear only once, and then in these proceedings, the parties have agreed to permit the testimony of the witnesses applicable to both cases, as well as the testimony of the witnesses applicable solely to the Taglia case, to be taken during the proceeding in this case for use in the proceeding on the James Jude Taglia case, when that case is set for proceeding now, therefore,

It is stipulated and agreed by and between the parties hereto, through their respective counsel, as follows:

1. Separate proceedings are to be held in this case and in the James Jude Taglia case; this case to be heard on July 8, 1963.

2. In this case the parties shall be permitted to take the testimony of all witnesses who accept a party's invitation to appear, and do appear at the proceeding in this case, subject to cross-examination by the other party, even though such testimony may be applicable solely to the James Jude Taglia case.

3. However, the testimony of witnesses as to matters relating solely to the Taglia case shall not be considered by the Field Board in making its decision in this case.

4. Direct and cross-examination of witnesses in this case as duly transcribed by the official court reporter, may be offered and received in evidence in the case of James Jude Taglia, as if taken on deposition for use in those proceedings, provided, however, that any of such testimony which bears solely on the matters in issue in this case shall not be received in evidence or considered by the Field Board in the proceeding of the case of James Jude Taglia.

5. Nothwithstanding this Stipulation, the testimony of any witness, whether applicable to this case, to this case and the Taglia case, or solely to the Taglia case shall be subject to objections made by either party, including but not limited to objections as to relevancy, materiality and competency.

As the matters referred to in this Stipulation were applicable to the James Jude Taglia case and to this case, this Stipulation has been executed in duplicate, and the duplicate original thereof shall be filed in the James Jude Taglia case to the extent that it affects the proceeding in that case.

Dated at Washington, D. C., this 5th day of July, 1963.

EXCERPTS FROM TRANSCRIPT (OSD 63-174 and OSD 63-131)
[Filed as a part of Exhibit A to Appellant's Motion for Summary Judgement]

* * *

[118] MR. MOSS: Before we go any further, I think that I should invite the attention of the Board to a change in our plans. We consented this morning to the witnesses being present with their attorneys. We are now withdrawing that consent for a number of reasons, but the fact remains that we now withdraw that consent. We will not consent to the witnesses having counsel present with them as their alter egos.

MR. DAVIS: Under those circumstances I should like a ruling from the Board whereby witnesses who desire to have their counsel present while testifying may have counsel present.

MR. ROCHE: Again, I refer to the portion of the directive which controls the procedure in such matters. My authority in that area is restricted. Again, I will contact [119] superior authority and request an interpretation of that provision of the directive so that I may provide the transcript with a ruling and with an indication that I have sought advice from higher authority.

MR. MOSS: Well, so that there is no misunderstanding, we not only withdraw our consent, but we firmly object to any departure from the regulations or the directive which would permit witnesses testifying at this hearing to have their attorneys present.

* * *

[132] ROBERT C. BYRNES
CROSS-EXAMINATION

BY MR. MOSS:

Q. The 34 verbatim pages, Mr. Byrnes, that were turned over to you by Mr. Applegate, were they marked in any way at the time you received them? A. Yes, sir. They were.

Q. And how were they marked? A. They had a Secret stamp on them and also the provisions of the Espionage Statute.

Q. And where was that placed on the documents? A. I believe at the bottom of them as I recall.

Q. On each page of the 34? A. Yes. sir.

Q. And it was just at the bottom of them? A. Yes, sir.

Q. Wasn't there also a stamp Secret at the top of the pages? A. Not that I recall, sir.

Q. Now, you say that you received 22 carbon copy pages that constituted, did I understand you, two copies of the same material of 11 pages each? [133] A. Yes, sir. There were 11 pages, two copies of each, totaling 22.

Q. So that actually the material that—the copies that you got. then. totaled 11 pages. A. That is correct.

Q. Of material. A. Yes, sir.

Q. Three of which you stated were duplicates—were they exact copies of three of the 34 verifax pages? A. The information was identical.

Q. Was it an exact copy? A. Yes. sir. I would say that it was.

Q. Do you remember now? A. Yes, I do.

Q. It was an exact copy. A. That is correct.

Q. Where is that material now that was turned over to you? A. It is in the custody of the F.B.I.

Q. The Federal Bureau of Investigation still has the original verifax copies as well as the carbon copies. the two sets of carbon copies. A. That is correct.

Q. Is there any reason why you can't produce those copies for examination and comparison here, Mr. Byrnes? [134] A. Subject to the instructions of the Department of Justice, I cannot produce them. No, sir.

Q. Have you requested permission to produce them? A. I have not.

Q. Do you know whether the Department of Defense has requested permission to have them produced at this hearing? A. I do not.

Q. Now, you have stated that you compared the 42 different pages that comprised the material turned over to you by Mr. Applegate, that is, 34 verifax pages and 6 copies, carbon copies of other pages of material. Can you tell us whether or not those eight pages were numbered? A. They were not numbered.

Q. Were any of the 34 verifax pages numbered? A. No, sir.

Q. Did there seem to be any relationship between the eight additional carbon copies and the 34 verifax pages? Could you tell, for example, whether those additional eight pages should fit in some place in the 34 or were additional to the 34? A. Well, as I said, they were unnumbered pages.

[135] Q. Could you tell by an examination of context as to whether or not they were continuations of pages in the 34? A. Do you mean an examination of these pages against the original documents?

Q. Yes, against the 34 Verifax. A. No. They were not continuous or consecutive.

Q. And they didn't fit any holes in the 34 pages? A. That is correct.

Q. In other words—well, were they related to the 34 pages? Were they the same type of material? A. Well, they related to budgetary material.

Q. Well, were they the same type of material that the 34 pages were? A. Yes, sir.

Q. Now, can you tell us what kind of material was in those 34 pages, in the 34 Verifax pages? What kind of material?

MR. DAVIS: I am going to object unless that question is intended to elicit a general response here. We are not going to introduce classified information into this record.

MR. MOSS: So far I haven't asked for any classified information.

MR. ROCHE: I am sure the witness is not quite about to disclose any information at this time. Being guided by that, you may answer.

[136] THE WITNESS: Yes.

BY MR. MOSS:

Q. What I want to know is what is the type of material? What did it consist of? Was it charts, graphs, schedules, written material? A. There were pieces of equipment identified in one column. In another column on the same line there would be a total dollar price for this equipment. In another column on the same line there would be the number of pieces of equipment. And generally they were the same type.

Q. In other words, these 34 pages, and we will limit ourselves to the Verifax material for the moment, these 34 pages, then, consisted primarily of schedules. In the left-hand column you say they were items of equipment described, and when you say items of equipment, I suppose you are referring to items of equipment which might be purchased by the Department of Defense, is that correct? A. Yes, sir.

Q. Then there was a column that had number of units and then there was a column that had dollar figures in it. Was there anything at the top of those columns, Mr. Byrnes? A. Describing what branch of the armed forces they were being designated for, yes.

Q. Well, were there any—were any years given? A. Yes, sir.

[137] Q. Well, where was the year given? A. It was given in each column if there was more than one year designated for the equipment.

MR. MOSS: We would like to have this marked Applicant's Exhibit No. G for identification.

(The said document was marked Applicant's Exhibit No. G for identification.)

BY MR. MOSS:

Q. I show you a document which has been marked Applicant's Exhibit G for identification, and which is purported to be stated on the cover page as details of the procurement section of the Department of Defense FY 1964 Budget. And I ask you to examine it, please, Mr. Byrnes.

MR. DAVIS: May it please the Board, I can see no possible relevancy for any document of this kind in this inquiry. The witness is testifying that he made a line-by-line comparison of the documents he recovered with two documents which were classified Secret by the Department of Defense. It is no part of the function of this Board to determine even if there were any question about the propriety of the classification of this document, no part of this Board's function to determine whether or not this was properly classified. And again I repeat there is no—in no way admitting these documents were not properly classified. The point is it is completely irrelevant to this proceeding.

[138] MR. MOSS: Let me say this if I may for the record, Mr. Roche. I would like to say it for the record. We have heard a lot here about this second document which we are now talking about and it has been conceded and admitted that that document was not marked at the time it was obtained by Mr. Taglia, nor was it marked until such time as Philco Corporation's security officer, Transue, marked it Secret and they turned it over to the Department of Defense.

The accusation has been made that at least as to Taglia, and I suppose it is going to be made as to Becker if they can ever tie Becker into this second document, that they either knew or should have known that this material was classified information even though it was not marked.

Now, what we are—what I am establishing and going to establish either here with this witness or with other witnesses is that the kind of information that was contained in document B as well as this document A is bruited around all over the United States and is available to the public and these people had no reason to believe whatsoever that these documents were classified.

Now, the purpose of this type of examination is to get from this witness—you have ruled that we can't see these documents. All that there can be therefore before this Board is a general description of the kind of information the document contained. Our only way to meet that, and we have a [139] right to meet it, is to show similar information to Mr. Byrnes or whatever witness they produce that says that this information is classified, that that information was available generally to the public at that time and it is now generally available.

Now, my question here to Mr. Byrnes is to ask him to look at this document and ask him if this doesn't contain the same kind of information that was contained in document B.

MR. ROCHE: Well, now, there was a question to Mr. Byrnes and that was to ask him whether or not he would examine the document.

MR. MOSS: That is all. That is as far as I had gone before the objection was entered.

MR. ROCHE: That is right. And now you just have proposed another question as—

MR. MOSS: That is correct.

MR. ROCHE: And that question was, if it might be repeated–

MR. MOSS: I haven't put it as yet.

MR. ROCHE: I thought you had.

MR. MOSS: No. I merely asked him to examine the document. That was the last question.

BY MR MOSS:

Q. Now, I invite your attention, Mr. Byrnes, to the charts set forth in this document as well as to the other [140] material in this document and ask you whether or not the information that you examined in document B as we are calling it was not of the same general kind and category as that information.

MR. DAVIS: May it please the Board, I renew my objection. More than that, Department of Defense will stipulate that columnar schedules containing information, accurate or inaccurate, with respect to the Department of Defense are available in non-classified form. It is not necessary to produce this kind of question. We will cheerfully stipulate that such information is available.

MR. MOSS: Well, then, I don't see what we are doing here on document B.

MR. DAVIS: Well, it will become apparent to you, Mr. Moss. It will become apparent.

MR. MOSS: I am waiting for–

MR. ROCHE: Would you like an answer to you question?

MR. MOSS: I would like an answer to my question.

MR. ROCHE: If you would like an answer to your question, then you may have it.

MR. MOSS: Fine.

Mr. Byrnes?

THE WITNESS: I could not answer that question without making a direct comparison of this document against [141] the classified material.

MR. MOSS: Well, at this time again we renew our demand that the government be required to produce document B so that that comparison may be made.

MR. DAVIS: The government respectfully declines to produce B, which consists of excerpts from two secret Department of Defense documents, and finds it somewhat difficult to understand how counsel can register a degree of righteous moral indignation when the Department of Defense wishes to keep the details of its budget secret from people who are not part of the Department of Defense.

MR. MOSS: Well, then, they shouldn't release it publicly and then try to accuse people of violations.

MR. DAVIS: Are you suggesting that this document was released publicly and given ligitimately to Mr. Becker or Mr. Taglia?

MR. MOSS: I am suggesting that this information was released publicly and was available to anybody who could read.

MR. DAVIS: That, sir, is contrary to the facts.

MR. MOSS: Well, you just got through admitting–

MR. DAVIS: I did not, sir.

MR. MOSS: –that information of this type was available generally.

MR. DAVIS: Sir, let me point out the difference between what I was admitting and what you are suggesting, sir.

[142] MR. MOSS: Well, will you do that so that we may understand.

MR. DAVIS: I am sure it is clear to you.

MR. MOSS: What are you admitting?

MR. DAVIS: I am admitting that estimates of what the Department of Defense might be spending or might contemplate spending are freely available to anybody who cares to guess. The information from the Pentagon, this is secret.

MR. MOSS: Even though it is released through the Senate and House Committees in the hearings?

MR. ROCHE: Is there any question before the witness?

MR. MOSS: My motion was that the document B be produced so that the witness could answer the question by compaing this information.

MR. ROCHE: And the Department counsel has stated that it is not available.

MR. MOSS: Well, let me say this, that without the availability of the document B we are trying this case in a vacuum.

* * *

[294]

JOSEPH M. TRANSUE
CROSS-EXAMINATION

BY MR. MOSS:

Q. Now, did you ask her to make that report in writing to you? A. I did.

Q. And did she subsequently make the report in writing? A. She did.

Q. To you? A. To me.

Q. As a directive to you? A. To me at the Philco Corporation as a security directive.

Q. And was this a typewritten report or was in long hand? A. This was a typewritten report.

Q. Did it contain any other information in it than a charge that there had been two previous security violations, the January and—the January and the March, 1962 documents? A. Yes.

[295] Q. What other information did it contain? A. It contained information relative to the continued violation of the special agency instructions relative to the handling of information that brought about the incident on the 24th of May.

She described in detail that there had been daily occurrances when the directives were violated up until that time; that she had been instructed by Mr. Becker to remove from the files, on a daily basis, this information which would be given to him only, and it was placed on his desk and remained there throughout the day.

And she noted on occasions that not even the secretary, who did not have the clearance to have access to that, —that even she was not there, and this was in a position where it could be compromised.

Q. Do you have that letter, — A. I do not.

Q. —Mr. Transue?

Who has the letter? A. That was given to the corporation.

Q. Although it was addressed to you? A. That's correct. It was addressed to me as security director.

MR. MOSS: I would like to request that the Board at this time require Mr. Transue to furnish that letter.

[296] MR. DAVIS: May it please the Board, all powerful as we may be, I fail to see how in the light of the witness's testimony, that he does not have the letter, he can be requested or directed or required to produce something which he doesn't have.

MR. MOSS: I submit that the letter, having been addressed to Mr. Transue, is under his control and should be under his control.

MR. DAVIS: Well, counsel suggests a course which would remove the essence. Unless the witness has it under his control, he can't very well produce it.

MR. ROCHE: Well, as Department counsel has stated, my authority is limited to the terms of the controlling directive, and I certainly cannot order the Philco Corporation to turn over any of its documents to this Board or to either counsel.

My understanding, from the testimony of the witness, is that he addressed, or the letter was addressed to him in his capacity as security officer for the corporation.

Since it is a corporation property, and as I gather from the evidence thus far, the request of the attorney for the applicants is denied.

BY MR. MOSS:

Q. Mr. Transue, did you make a copy of that letter? A. I did not.

[297] Q. Now, did the letter contain anything else besides what you have already testified to? A. Such as what?

Q. Well, I am asking you.

Did it contain anything else than a reference to the January, 1962 document, the March 9, 1962 document, and what you have testified to as continued violations, alleged violations, of the information with reference to the special agency? A. Yes. It contained a reference to the April the 6th violation which you have asked to have removed as an issue.

Q. Did it contain anything else, Mr. Transue, besides that? A. I have no idea as to what you are asking.

Q. Well, Mr. Transue, you saw the letter. A. That's correct.

Q. I'm asking you: Did it contain anything else? A. This contained a report of the incidents, as I have described, and that she was leaving--had left Philco.

She did not say where she was working and that was the content of the letter.

Q. The letter had nothing else in it, Mr. Transue? A. My answer to you will simply have to be this, that I do not have the letter with me.

* * *

[335] Q. Did you ever report, other than to Mr. Maude, to any company official of Philco Corporation that Mr. Becker was violating company instructions with reference to your job, that is, your right to receive reports directly from security officers? A. In my summary of the entire matter, when I reported to the management, I included that in there.

Q. Did you make a written report to the management? A. I did.

Q. Do you have a copy of that written report? A. I do not.

MR. MOSS: I suppose it is useless for me to ask that [336] he produce a copy of that report?

MR. ROCHE: The least you can do, Mr. Moss, is elicit a ruling.

MR. MOSS: Well, I will elicit the ruling.

BY MR. MOSS:

Q. I will ask, first of all, Mr. Transue, will you produce a copy of that report? A. I do not have it to produce.

Q. Don't you keep copies of the reports that you make in your files? A. I have answered your question, sir.

I do not have it to produce.

Q. You do not have it in your files? A. I do not, sir.

Q. You have no copies of it? A. I do not have a copy of it.

Q. Who does have the original of the report? A. I do not know at this particular moment.

Q. Who did you deliver it to? A. I delivered this to the management representative.

Q. What management representative? A. Well, it was delivered to the Legal Department.

Q. Who, in the Legal Department, did you deliver it to? A. I delivered it to the General Counsel's office. I don't know who has it.

[337] Q. And who was General Counsel at that time? A. Henry R. Nolte.

Q. Is he still General Counsel? A. He is.

Q. Now, when you delivered it to the legal office, how did you deliver it? A. By hand.

Q. By hand?

Did you leave it with some individual in that office? A. Naturally.

Q. Who was that individual? A. It was left right with the General Counsel.

Q. You mean you delivered it to Mr. Nolte? A. Picked up by him, yes.

Q. Now, that is not an answer to my question.

MR. MOSS: Will you please read the question again?

MR. ROCHE: Read the question and answer, please.

(The Reporter read the last question and answer.)

MR. ROCHE: Is that what you meant, Mr. Transue?

THE WITNESS: What was my answer?

(The Reporter read the answer.)

THE WITNESS: Yes, it was delivered to that office.

Whether Mr. Nolte picked it up or someone else, I cannot recall, but it was left with the General Counsel.

[338] BY MR. MOSS:

Q. All I want to know is to whom, in that office, did you physically deliver or hand the report? A. This report was discussed among many, and it was left after the discussion.

I cannot say that I handed it to anyone.

MR. DAVIS: May it please the Board, –

THE WITNESS: It was left there as a part of the record.

MR. DAVIS: May it please the Board, I am going to object to any continuation of this line of examination.

I am trying not to object, because it takes more time to get the objections ruled on than it does to get the answers to the questions.

But, surely, we have by now established that this witness does not have a copy of this report in his possession, and, therefore, cannot produce it.

MR. MOSS: However, I have a right to know where it was and to whom he delivered it.

This is within the realm of proper cross-examination, may it please the Examiner.

MR. ROCHE: Well, you do not have much further to go. Why do you not continue on, Mr. Moss?

BY MR. MOSS:

Q. Will you describe the circumstances, Mr. Transue, [339] under which that report was delivered to the General Counsel's office? A. Yes. It was following a meeting, when I reported the entire investigation to management.

Q. All right. Now, where was that reported? A. On the 6th floor of the Philco facility, Plant 2, C and Tioga Streets in Philadelphia.

Q. And who was present at that meeting? A. Cavallaro, Jones, Berry, Nolte.

Q. And did you have that written report with you in your hands at that meeting? A. At that meeting, –I gave it to them at that meeting.

Q. Well, my question was:

Did you have it with you at that time? A. Yes, when I–

Q. In written form? A. That's correct.

Q. All right. At the end of that meeting it was turned over to that group, was it? A. That's correct.

Q. So it wasn't delivered to the General Counsel's office? A. I did not say that it was delivered to him personally.

Q. But you said that it was delivered to the General Counsel's office, Mr. Transue. [340] A. I said that the General Counsel had it, to the best of my knowledge.

Q. Well, the question is:

Was it delivered to the General Counsel's office? A. Not in his office, no.

This took place in Mr. Jones' office.

Q. And when you left Mr. Jones' office, you left the report there? Is that it? A. I did not take it with me, that's correct.

MR. DAVIS: Perhaps the confusion is caused by the fact that the General Counsel and the Associate General Counsel were at the meeting.

BY MR. MOSS:

Q. Now, this report that you made, did this concern–remember, we are again getting off base here, Mr. Transue,–did this concern the January and March alleged violations or did this report contain the violation of security–I mean, of company instructions by Mr. Becker? A. Now, you have asked two questions there.

Which do you want to be answered by me.

MR. ROCHE: No, he has not. He has asked whether the report pertained to two matters or did it pertain to simply one of those two matters, and would the Reporter please read the question?

[341] (The Reporter read the question.)

MR. ROCHE: Did you understand the question?

THE WITNESS: It referred to the company's instructions, violated by Mr. Becker, as well as the incidents that we have talked about here, the March and January.

BY MR. MOSS:

Q. Did it refer to anything else? A. Yes. It referred to the May 24th incident with the special agency.

It referred to the April 6th incident that has been ruled out.

Q. And is that all that it referred to? A. That is correct.

MR. MOSS: I think that we are just about to a point where it would be convenient to take a break before I start a new line of inquiry.

MR. ROCHE: We will resume—

MR. MOSS: Oh, by the way, I also want for the record, before we do adjourn, to request that the Examiner instruct the witness to furnish a copy of that report.

MR. ROCHE: The same ruling is applied here as was applied to the previous request for a document, which is in the possession of the Philco Corporation, and the request is denied.

* * *

[515] ROBERT BERRY
CROSS-EXAMINATION

BY MR. MOSS:

Q. Now, it was after this August 10th meeting that you then went to Mr. Nolte, your boss, and said, "Look, we have got a serious problem here."

Is that correct? A. That is correct.

Q. And when you said, "We have got a serious problem here" you meant Philco Corporation had a serious problem? A. I meant all involved had a serious problem.

Q. But you were primarily interested in Philco Corporation's standing with the Department of Defense, were you not, and the contractual obligations that it had— A. Yes, I was an employee of Philco.

Q. That is right.

Now, then you said there was another meeting set up and this meeting was set up on August 21st? A. That is correct.

Q. So that if we go back and look at the document or at the Government's document, or, Exhibit A-1, which is dated August 16, 1962, this was prepared by you between the first meeting of August 10th and the second meeting of August 21st.

Is that correct? A. That is correct.

[516] Q. Now, between August 10th and August 21st, did you do anything with reference to this problem, other than to prepare this memorandum? A. No—well, I talked to Mr. Nolte on several occasions.

Q. But outside of talking to Mr. Nolte about the memorandum— A. I discussed the problem with Mr. Canfield, I am certain, with Mr. Jones, Mr. Cavallaro, and Mr. Transue.

Q. Well, now when you prepared the memorandum of August 16, 1962, did that go through more than one draft? A. Yes, it did.

Q. How many drafts did that one go through? A. I couldn't begin to tell you, Mr. Moss. Several.

Q. And each time you prepared a draft, what would you do with the draft? Submit it first to Mr. Nolte? A. No. It probably. if my work habits were the same then as I remember them to be now and as they are now and have always been, there were two or three drafts before I went in to see Mr. Nolte.

Q. And then did you submit the drafts of those—say the third draft that Mr. Nolte looked at— A. I showed him how I had set it up and asked him if this was the way he wanted it.

He approved of it and I went back and put it in the final [517] form—had it typed in the final form.

Q. But before that did you submit the draft to anybody else besides Mr. Nolte? A. As I recall, I asked Mr. Jones and Mr. Transue to look at it and see whether or not I had accurately set forth the facts.

Q. Did you have the January—the July 17, 1962 Poole letter before you? A. Not at that time.

Q. Did you see the January—I mean, the July 17, 1962 Poole letter at the August 10th meeting? A. I did not.

Q. Did you ever see the Poole letter? A. To my memory, I saw—now which—were there two letters from her or one letter or what?

Q. Well, we are only aware of one letter dated July 17, 1962. A. I saw—

Q. There may have been others? A. I don't know. To my memory I read a letter that she had written.

Q. Now, will you describe to us and tell us what the contents of that letter were? A. I really couldn't.

Q. You mean you don't recall what the letter said? [518] A. Only in general terms and not sufficiently to be able to testify to it.

Q. Well, let's get what you do recall about it, Mr. Berry.

Did it refer to the January 1962 document? A. Here I have to interject, Mr. Examiner. I was an authority for a client and I was working in an attorney-client relationship there.

And I think that those documents have been claimed privileged and I don't feel that I am released to discuss them if the company has not released them.

MR. MOSS: A privileged communication of this kind between lawyer and client does not apply to company counsel.

THE WITNESS: I am sorry—it does.

MR. DAVIS: May it please the Board, there are decisions, decisions in the California Federal Courts and decisions in the Pennsylvania Federal Courts providing that it does apply to company counsel acting in a capacity as lawyer for the company.

But I don't think that Mr. Berry has to take that position before this Board in any case.

The Government has made a formal demand for the production of that letter. Philco has declined to turn it over.

If this witness considers himself bound, under those [519] circumstances he is at liberty not to testify.

MR. MOSS: Well, let me invite the Examiner's attention to the fact this is not Philco property.

This was a letter written by a person who was not at the time employed by Philco Corporation.

It cannot be considered, under those circumstances, as Philco Corporation property. Under the circumstances, the privilege is not available.

Now, if the witness—I suppose he can refuse to answer but it is our contention, and I want to make this clear, that the Poole letter clearly indicates, and we are going to get a hold of it in one way or antoher—I can assure you of that—that the Poole letter indicates that it is the complaint of a disgruntled former employee.

And to me it is an essential document to a determination of this case.

Now, we are going to have to get at it in one way or another. If the witness refuses to answer, I suggest that he refuse to answer within the full implication of the penalties of Title 18, Section 1001, in which he is concealing information, and I doubt that the Government should take the position in this case that it is not admissible.

MR. DAVIS: May it please the Board, first of all, as I understand counsel's statement, counsel has never seen the letter.

[520] Yet he stands here before this Board and characterizes that letter, which he has not seen and neither of his clients have seen, characterizes that letter as the product of a disgruntled employee.

I do not believe that that is professional conduct to start off with.

Two, the Government has made every possible effort to get that letter and has been refused, and we emphatically join—we emphatically join with counsel for the applicant in wishing to produce that letter before this Board, but we cannot obtain it.

MR. de SEIFE: Mr. Examiner, may I—

MR. DAVIS: Just one second. I am entitled to finish.

We do not wish to give the applicant or his counsel the opportunity to argue that a document of this kind is being purposely withheld and it is not.

We have asked for it and we have been turned down and the reason we have been turned down is because Philco, as I understand it, and as I was informed, expected just the kind of tactics in connection with this case that the applicant has demonstrated by his suit against his secretary for three quarters of a million dollars.

Philco was afraid and they had a right to be afraid.

MR. de SEIFE: Are you finished, Mr. Davis?

[521] MR. DAVIS: No, I am not finished.

To state that this witness does not assert his privilege as an attorney before this Board is not so and I think the record should reflect it.

* * *

MR. MOSS: Mr. de Seife had the right to make that statement and I am glad he made it.

However, let me say this: We do have reports of what the letter contained.

Mr. Beck reported to Mr. Becker the general nature of that letter and what it contained and, in addition to that, during a telephone conversation between Mr. de Seife and Mr. Nolte of Philco Corporation, some of the general characteristics of the letter were discussed and disclosed by Mr. Nolte.

In addition to that, because of that disclosure, we have put Philco Corporation on notice that letter is not to [522] be destroyed because we will seek it in a proper form where we have the power to subpoena.

Now, it seems to me that counsel's attitude is inconsistent. He joins with us in making a demand on Philco that this letter be produced and at the same time admits that Philco has refused to produce it and refuses to permit us to cross examine a witness with reference to it.

MR. ROCHE: Well, the statements of counsel are in the record.

There was a question and there was some sort of answer, and I would like to have it re-read so that I may be refreshed, as to what the situation is.

(The last question and answer, as recorded, was read by the reporter.)

MR. MOSS: Before I go any further, Mr. Examiner, I would also like to point out that Government's Exhibit A-1, in the first paragraph states, "January 1962: In a letter dated July 17, 1962 to Mr. Transue, Manager, Safety and Security Department of Philco, Mrs. Patricia A. Poole, who prior to her resignation of July 1962 had been the Security Officer in the Washington office, alleges that the following breach of security took place".

MR. DAVIS: May it please the Board, I would like to call the Board's attention to the fact that the testimony is perfectly explicit on this point.

[523] The original report with respect to this matter was made while Mrs. Poole was employed by Philco. It was orally. She was requested by the Corporation to submit a report in writing, which she did.

MR. MOSS: I must answer that. I am sorry.

But it is our position that the original oral report was made on July 22, 1962, in accordance with Mr. Transue's testimony, at which time it is our information Mrs. Poole was employed by ARMCO.

She had left Philco Corporation on the 15th, taking her terminal leave at that time, and had accepted employment with the ARMCO Company on June 22nd.

We hope that the record will establish that.

MR. ROCHE: Well, in so far as the immediate question is concerned, there has been an assertion by the witness of the relationship of attorney-client which existed at the time and there has been no release by his client or his then client.

He has made that assertion and it is honored with respect to that question.

MR. MOSS: May I except to the ruling of the Board for the reason that it is impossible in this proceeding for this Board to make a complete determination and a fair determination of this matter unless this line of inquiry is permitted.

[524] MR. DAVIS: May it please the Board, in response to counsel's comment, I should like to state we have previously had a witness on the stand, and that the Department of Defense permitted inquiry into the contents of that letter at great length with no desire to shut off inquiry.

We did not object to the questions that were put to Mr. Transue with respect to the contents of that letter nor do we intend to object, and to the extent that Mr. Berry feels that he can answer questions with respect to that letter we have no objection.

MR. MOSS: That leaves it up to Mr. Berry then, as I see it.

MR. DAVIS: Yes.

MR. ROCHE: There is now no question before the witness.

BY MR. MOSS:

Q. With the knowledge that Government counsel has no objection to your answering questions, Mr. Berry, with reference to the Poole letter, do you still take your same position? A. I do.

* * *

[526] BY MR. MOSS:

Q. Referring to the meeting of August 21, 1962. does [527] Government's Exhibit A-2 recite everything that took place at that meeting? A. May I look at A-2, please?

(Mr. Roche handed the witness a document.)

THE WITNESS: No, it does not.

BY MR. MOSS:

Q. The asterisks indicate throughout this memorandum what was deleted? A. This is an extract of a full memorandum. dated August 29, 1962.

Q. I understand. A. Which was submitted to the Government. and the asterisks indicate where there have been deletions from the full memorandum.

Q. Let me ask you, that language that has been incorporated into this, as you have called it, "extracted memorandum", is that verbatim from the original memorandum or were there changes made in that? A. This is verbatim from the original memorandum.

Q. And the asterisks indicate where information was deleted. A. From the original memorandum.

Q. Yes. Let's look at the first page of that. Mr. Berry. The first three paragraphs of the full memorandum? [528] A. To the best of my knowledge and memory it was.

Q. Then there are asterisks indicating the deletion of material? A. That is correct, on page 1.

Q. Now, what was the material that was deleted from the memorandum at that point? A. Mr. Examiner, once again I have to claim the lawyer-client privilege.

This was a document prepared in my capacity as a lawyer for the Philco Corporation and it is my understanding that they have not released the full document, and I feel therefore that I am not released to discuss the material that has been omitted.

MR. MOSS: I am not going to argue it, but we want the Examiner's ruling.

MR. ROCHE: The same ruling as was made upon the previous assertion.

MR. DAVIS: Again, may the record reflect that formal demand has been made upon Philco for the full memorandum and we have been refused.

BY MR. MOSS:

Q. All right. Now, will you again take the memorandum, Mr. Berry, and look at page 2.

Now, at the top of the page there are some asterisks, again. That indicates that the material following the full [529] paragraph at the bottom of page one was again deleted from the memorandum? A. That is correct.

Q. Do you take the same position with reference to the disclosure of the deleted material there as you have taken previously? A. I do.

Q. May we then assume, without going through the memorandum page by page, that you will take the same position with reference to the deletions at the end of the full third paragraph on page 2 carrying over to the top of page 3, and to the deletions indicated at the top of the last page of the memorandum? A. You may assume that and also that I will take the same position as to the deleted material on page 4.

Q. Did I miss page 4? Oh, yes. In the third line– A. That is correct.

Q. Of page 4. Now you have said – you have previously testified in response to a question on direct examination that you have lifted all of the factual material with reference to the January 1962 and the March 1962 documents from the original memorandum and extracted it in this memorandum that you delivered to the Government? [530] A. That was my instructions from Mr. Nolte. To the best of my memory I followed his instructions explicitly.

Q. Now, directing your attention to the deletion of the material at the top of page 4 in the language which says, "In fact, the paper came from the same source as the January document", and then asterisks, can you, on examining that, say that at that position there was factual material – there was no factual material that bore on this document, although the paragraph continues with, "he indicated that he had been"? A. Yes, this would be my position.

Q. So that there was then interspersed in your memorandum, in some of the paragraphs, factual information that related to the January 1962 and March 1962 documents and other factual information that did not? A. That is not correct, Mr. Moss.

Q. That is not correct? Well, will you explain? A. The factual information that was contained in the full document pertaining to these two incidents – it was my direction and as I say I remember following the directions explicitly – was put into this extract and all the factual information pertaining to these two incidents that was in the complete document was put into this.

Q. My question is directed to the fact that it would appear at least upon examination of the paragraph in which these asterisks are placed that the last sentence following [531] the asterisks is also part of the para-

graph and therefore that material was deleted from this paragraph of the original memorandum. A. You appear to state a conclusion and I can't comment on it because I don't fully understand what you are saying

Q. Well, I am saying –

MR. ROCHE: Would you care to rephrase your question?

BY MR. MOSS:

Q. Here is a paragraph. It starts at the bottom of page 3. It carries over to the top of page 4. It obviously refers to the first meeting that you testified to on August 22, 1962, at which Mr. Taglia was present and the entire paragraph appears to refer to the matters that were there discussed with Mr. Taglia.

Now, I am asking you how could there have been material in the middle of this paragraph, from a construction standpoint, that was not related to Mr. Taglia's testimony or – strike the word "testimony" – to the discussion with Mr. Taglia?

We will get to that later. A. I can only repeat, Mr. Moss, that I was instructed by Mr. Nolte to lift all the factual information from the document [532] and put it in an extract copy – factual information pertaining to the January and March papers, and put it in an extract copy using asterisks to indicate where there was material omitted.

Now, it is quite conceivable, Mr. Moss, that again from a construction standpoint that the whole recitation of Mr. Taglia's discussion was put forward in one paragraph and perhaps it was poor gramatical construction so to do.

I can't recall that.

* * *

[536] MR. MOSS: Let the record show that the Hearing Officer perhaps does not understand my question.

What I am asking this witness to tell us is this:

If he will not answer any questions with reference to the deleted material how can we then determine other than on his say-so, that only non-factual information relating to the two documents in question, has been deleted from the memorandum?

MR. DAVIS: May it please the Board, in addition to this witness, Mr. Transue was also asked with respect to this and he also gave the same answers.

I am sure counsel doesn't want the witness to violate the relationship he has with his client.

[537] He not only cannot answer the questions but, under the canon of ethics of the legal profession he should not answer the questions.

MR. MOSS: There are a number of decisions in cases like this that hold that corporate counsel have no such position.

In view of the ruling by the Examiner, we are barred from requiring this witness to answer any questions –

MR. ROCHE: I am going –

MR. MOSS: – and we are being asked to accept this witness' opinion.

MR. ROCHE: I am soing to sustain the objection to the question which is presently up for consideration.

MR. DAVIS: Let me point out that counsel – the witness would be discharged from his obligation to maintain a lawyer-client relationship if, pursuant to court direction, he were required to answer the question.

But since this Board cannot direct him to answer the question he cannot be discharged from his obligation.

I assume that this is the position that the witness is taking.

MR. MOSS: The Government's position is obvious.

* * *

[1040] PATRICIA ANNE POOLE

CROSS EXAMINATION

BY MR. MOSS:

Q. There has been testimony at this hearing, Mrs. Poole, that on July 17, 1962, you addressed a letter to Mr. Transue in which you described the alleged Document A and Document B incidents. Did you write such a letter?

MR. ROCHE: Before the witness answers, I would like to know, Mr. Moss, whether or not you intended to convey the impression that this was the date upon which the letter was addressed or upon which it was sent or upon which it was received.

MR. MOSS: Well, I will correct it. I intend to convey the information that, as I understand the testimony, the testimony has been that a letter dated July 17, 1962 –

MR. ROCHE: Thank you. All right.

MR. MOSS: Was transmitted to Mr. Transue.

BY MR. MOSS:

[1041] Q. My question is did you write such a letter?

MR. MACKALL: I don't know if I have status here to object, but in view of the pendency –

MR. MOSS: Just a moment. I don't believe that counsel does have the status to object.

MR. MACKALL: Well, I am going to instruct –

MR. MOSS: He may advise his client as I understood the ruling of the Examiner.

MR. ROCHE: Well, first, I would like to study my notes before there is any further discussion and if—I am going to take a five minute recess for that purpose, and so declare a five minute recess now.

(A short recess was taken.)

MR. ROCHE: May the record show that all persons who were present immediately prior to the recess are again present.

May it also show that there is a reference to the letter dated July 17, 1962, in the first full paragraph of Government Exhibit A-1.

May it further be stated for the record that, if Mr. Mackall desires to intervene or interrupt at any time, that he do so through Department Counsel, near whom he is seated, the purpose, of course, being to give him full opportunity to consult with his client anytime he desires.

MR. MOSS: Well, the question, then, is still on [1042] the record –

MR. ROCHE: Yes. Would the reporter –

MR. MOSS: – unanswered.

MR. ROCHE: – read the question.

(The question was read by the reporter.)

MR. DAVIS: Just a moment. I have been advised by Mr. Mackall that he desires to advise his client that she not answer any questions with respect to a letter dated July 17, in view of the pendency of the litigation involving his client.

I want to disassociate myself with this statement. As far as the Department of Defense is concerned, Mrs. Poole may answer any questions, proper questions, which are put by counsel.

MR. MOSS: Well, now, I am afraid I don't understand that.

MR. ROCHE: May I say –

MR. DAVIS: The Examiner has asked Mr. Mackall to communicate with the Board through me. So I am delivering a communication. However, this does not represent the Department of Defense's position.

MR. ROCHE: Now, Mr. Moss, in your question you referred to testimony as being – as indicating the writing of a letter. My reference, and the only one I have found, is in Government's Exhibit A-1 which is, of course, in evidence [1043] but is not testimony.

MR. MOSS: There was also testimony by Mr. Transue that he received such a letter.

MR. DAVIS: Right. There was such testimony. As far as we are concerned, the question is relevant and material to the issues.

MR. ROCHE: The witness may or may not answer the question as she desires.

MR. MOSS: Well, may we request, then, at this time that in connection with the witness' refusal to answer any question concerning this letter, that she again be reminded of the provisions of Title 8, Section 1001.

MR. ROCHE: Eighteen, you mean.

MR. DAVIS: I see no reason for so advising the witness.

MR. ROCHE: I will not remind the witness. I have already read the provisions of that section of the Code to the witness, and I have complied with the directive, and I see no necessity for a further reading of it.

MR. MOSS: Well, it is our position that this constitutes a concealing or covering up within the prohibitions stated in Title 18, Section 1001.

MR. DAVIS: It may take that position, sir.

MR. ROCHE: You may take that position, and your remarks are in the record, and the witness may or may not [1044] answer the question.

MR. MOSS: Now, let's also get this clear. Does she refuse to answer any questions concerning the writing of the letter?

MR. ROCHE: We have one question first that is unanswered. And I don't think we should contemplate any other reactions of the witness or speculate about them at this time.

BY MR. MOSS: What were the contents –

MR. ROCHE: Is it my understanding that the attorney for the witness through Chief Department Counsel has advised the witness not to answer the question and the witness takes that position?

THE WITNESS: Can I speak with him a moment?

MR. ROCHE: You may speak with your counsel.

The question by Chief Department Counsel was, do you take that position?

THE WITNESS: I do.

BY MR. MOSS:

Q. Do I understand, then, that you now refuse on the record to answer any questions whatsoever with reference to the letter dated July 17, 1962? A. Upon advice of counsel, I do refuse to answer any questions.

[1045] Q. And any question that I might direct to you concerning the writing of that letter and the contents of the letter you will refuse to answer on the same grounds? A. Upon advice of counsel.

Q. I want this clearly and definitely understood, and will you say it in your words. What is your position in this hearing with reference to any questions that might be addressed to you by counsel for the applicant as to the writing of the letter of July 17, 1962, and its contents?

MR. DAVIS: Just a moment. Objection. We have had it clearly on the record.

MR. ROCHE: May the –

MR. DAVIS: We don't need to belabor it.

MR. ROCHE: Would the reporter read the question, please.

(A portion of the transcript was read by the reporter.)

MR. ROCHE: It is repetitious, Mr. Moss.

MR. MOSS: I would rather have the record indicate rather clearly and definitely the witness' refusal to answer the questions.

MR. DAVIS: It does so indicate.

MR. ROCHE: It does so indicate.

MR. MOSS: I don't believe that it does, at least not to the extent that we wish it to do so.

MR. ROCHE: It does for the purpose of these proceedings [1046] Mr. Moss.

MR. MOSS: Well, I would like to ask a few more questions.

BY MR. MOSS:

Q. Mrs. Poole, did you keep a copy of the July 17, 1962 letter?

A. Upon advice of counsel I refuse to answer that question.

Q. Mrs. Poole, did the July 17, 1962 letter contain anything else in it than the references to documents A and B?

MR. ROCHE: I am going to –

MR. DAVIS: I am not going to object to the question. I think the question is a perfectly proper one. I think it goes to matters which are relevant to this determination. I wish the witness would answer.

MR. ROCHE: Would the reporter read the question, please.

(The question was read by the reporter.)

MR. ROCHE: Now, counsel, my recollection is that the witness has stated that upon advice of counsel she does not desire to testify concern-

ing the July 17 letter, including its writing and its contents. This question pertains to the contents and therefore it has – it is repetitious.

MR. MOSS: I must insist for purposes which should be obvious to everybody so that there can be no question about [1047] this in the future that the witness answer this question and refuse as she has in the past to answer it.

MR. ROCHE: For the purpose of this proceeding it is repetitious.

MR. MOSS: You therefore sustain an objection to the question?

MR. ROCHE: There has been no objection made. That is upon my own determination.

MR. MOSS: In other words, this is the Examiner's independent ruling with reference to this question.

MR. ROCHE: Any ruling I make is independent, Mr. Moss.

* * *

[1227] MR. MOSS: At this time the applicant in the case now being heard, Leo George Becker, moves that the Examiner report this case back to the Department of Defense on the ground that this hearing, as it now stands, and the Government's case as it now stands, can not, under the executive order, that is, 10865 as amended, accord to the applicant the protections granted to him by Section 3 of the executive order, in that a full opportunity to cross examine persons who have made oral or written statements adverse to the applicant has been denied to the applicant by the seeking of refuge by Witness Berry behind –

MR. ROCHE: Do you mean "Berry"?

MR. MOSS: Yes. The witness Berry.

MR. ROCHE: All right.

MR. MOSS: – behind the claimed attorney-client privilege by his refusal and the refusal of other Philco witnesses to produce the Poole letter and the full text of the report of the meetings at Philco on August 22, 1962, and by the [1228] refusal of witness Poole to submit to cross examination concerning the July 17, 1962, letter or to answer any questions with respect to it.

* * *

CHARLES E. BECK

[1884] DIRECT EXAMINATION

BY MR. MOSS:

* * *

MR. MOSS: – before we go any further I want to ask Mr. Beck at this time whether he will produce the July 17, 1962, letter written to the Philco Corporation by Mrs. Patricia Poole.

MR. DAVIS: Just a moment. Before we get into the substance of Mr. Beck's testimony, the record should at this [1885] time reflect the agreement that was reached in Washington that is as to the time or that Mr. Beck's available time will be split here between the direct examination and cross examination.

* * *

BY MR. MOSS:

Q. Do you have in mind the question that I directed to you, Mr. Beck? A. Yes, I do. It is my understanding that you made a similar request of my counsel and they have denied it and I support their position.

Q. In other words, it is clearly understood that that letter will not be produced for the purposes of this hearing? A. That is correct.

[1886] Q. I think the record should reflect at this time that the government has also made a demand and that demand has also been refused.

All right, then.

My second request to you, Mr. Becker:

Will Philco Corporation produce at this time the full unexpurgated memorandum of the occurrences at a meeting alleged to have been held at Philco Corporation with Messrs. Taglia and Becker on August 22, 1962?

A. May I refer to my counsel?

(Witness conferred with his counsel.)

THE WITNESS: It is my understanding that that request also has been made previously and has been denied by our counsel and I support our counsel's position.

BY MR. MOSS:

Q. Then I have one final question—

MR. DAVIS: Just a moment, sir. Let the record reflect that the government also has made a demand for the full memorandum and it has also been refused.

BY MR. MOSS:

Q. During this examination this morning, Mr. Beck, will you answer any questions concerning allegations or statements made in the July 17, 1962, Poole letter, other than those which have specific reference to what have been called or what has been called in this proceeding Document A and Document B?

[1887] MR. DAVIS: One minute for that.

There is no reason to ask the witness to state in advance what questions he is going to answer.

MR. MOSS: I am only trying to save time.

MR. DAVIS: I realize that.

MR. ROCHE: That covers quite a lot of territory. Perhaps you could redefine your area a little more.

BY MR. MOSS:

Q. I wish to ask the question of the witness, then, whether or not he will testify in this proceeding with reference to any allegations made by Patricia Poole in her July 17, 1962, letter, with reference to the personal conduct of employees in the Philco Washington office during the period she was employed there that have nothing to do with security.

Is that clear enough, do you think? A. I think I can answer your question.

I have never seen the letter. So as a result I couldn't respond to the question because I don't know.

I have never seen the letter that she submitted to whoever she did in our company.

* * *

[1888] BY MR. MOSS:

Q. Were you ever informed as to the contents of the Poole letter, Mr. Beck? A. In detail, no.

Q. Were you ever informed that that contained statements or allegations of personal misconduct by employees of the Philco Washington office? A. Yes, I believe I was informed of that.

There was something of that nature. I did not get into it in detail and I never saw the letter.

Q. Then I will direct one final question:

Will you testify in this hearing with reference to what you were told about those allegations of personal misconduct?

MR. DAVIS: Just a moment.

There is no testimony yet that this letter contains any allegations of personal misconduct.

I object to questions which are based upon a conclusion that the letter does so contain these.

[1889] MR. MOSS: Mr. Beck has testified that he was informed, –

MR. ROCHE: That is true. And it would be hearsay and it would not be within the confines of the statement of reasons.

MR. DAVIS: Just a moment. And there is no definition that the allegations of misconduct have anything to do with either Taglia or Becker.

MR. ROCHE: I said it would not be within the confines of the statement of reasons counsel and I believe that would be–therefore it would be irrelevant to this case.

MR. MOSS: Then let the record show of course that we except to this ruling which is one of a series with reference to this letter.

* * *

[1936] REDIRECT EXAMINATION

BY MR. MOSS:

Q. Mr. Beck, you have testified that whenever there were important meetings it was your practice to have minutes of those meetings prepared and that to the best of your recollection you instructed that sufficient minutes be prepared of this meeting. A. (Nods affirmatively.)

* * *

[1979] ROBERT M. JONES

CROSS EXAMINATION

MR. MOSS: Let me ask him:

Will Philco Corporation produce that report and the supplement?

MR. DAVIS: May it please the Board, we have already had the position, and the record reflects, on numerous occasions that the Philco Corporation has taken with respect to that report.

The government has attempted to obtain it, unsuccessfully, and we understand that the applicant has attempted, unsuccessfully, to obtain it, too.

MR. MOSS: All I want the record to clearly reflect is that that report is not going to be furnished.

MR. ROCHE: Through this witness?

THE WITNESS: As far as I am concerned, no—

* * *

EXCERPTS FROM TRANSCRIPT
[OSD 63-131, Mar. 2, 1964]

* * *

[133] FRANK HAROLD SARGENT

DIRECT EXAMINATION

BY MR. MOSS:

Q. Is the examination and investigation used solely for the purpose of permitting the examiner to make, form an opinion as to whether or not the examinee has told the truth or is telling a falsehood with reference to the particular matter under inquiry? A. It is a very difficult question, Mr. Moss, and I can only answer it in this respect. In this type test concerning your client, that was the specific purpose.

* * *

[138] A. Mechanically, of course, beforehand naturally during the interview I discussed with Mr. Taglia the exact purpose, what questions I was to ask, the specific purpose as far as I was concerned. I also told him the same as I have in all cases that the only thing beneficial, the fact that he was taking the test would be the fact of whether or not he was definitely telling the truth, and that if he had no intention to tell the truth and had not told the truth, there would be no purpose in taking the test. I discussed with him all phases of each question with the exception, of course, of the irrelevant and general control, and –

* * *

[145] Q. During your examination of Mr. Taglia, did you have certain specific purposes in mind? A. Yes, sir, I did.

Q. And what were those purposes? A. To determine if possible whether he admitted that he tore from the bottom of Document A the

word "secret" or whether he actually tore this word or stamp from this same document. Whether prior to the time the investigation started, he knew that either Document A or B was secret. Whether he received Documents A and B from Mr. William McGinty. Whether he did, as he stated, return Document A to Mr. McGinty, and whether he –

* * *

[174] Q. So that in some 15 to 20,000 cases you have had confessions from the person involved that he was not telling the truth. [175] A. Correct, sir.

Q. Where the machine shows that he has been telling the truth as in this case, what percentage of cases are you able to verify? A. About the same percentage I would think.

* * *

[187] Q. I would like to know why you were satisfied that the word at the bottom of that page was not secret. A. Because there was no indication to that question on my chart that indicated to me that he was not telling the truth with respect to that question. It is just that simple.

Q. Is that your recollection now? A. Yes, sir.

Q. And you testify to that under oath? A. Sure.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. James J. Taglia received a Bachelor of Science degree from Butler University, in 1949. In 1956 he became a government sales representative of the Underwood Corporation in Washington, D.C. and was granted an access authorization to classified government material of the Secret grade, under the Department of Defense Industrial Security Regulation. Hereinafter the access authorization will be referred to as "security clearance". He continued to hold a secret security clearance until January of 1963. In the interim, however, he left Underwood Corporation and became a government sales representative of the autonetics division of North American Aviation Corporation, where he remained until January of 1962. On January 2, 1962, he became senior government sales representative, handling Air Force programs, for the Philco Corporation, working out of the Philco Corporation Washington office. In December of 1963, Plaintiff left the employ of the Philco Corporation and accepted a position in the Houston, Texas office of Melpar, Inc., where his duties would have involved dealings with the Department of Defense. In each of the positions held by the Plaintiff, including the Melpar, Inc. position, a security clearance was a sine qua non of continued employment.

2. Plaintiff Leo George Becker did not complete his college education. After some employment, which is not perti-

nent here, he was drafted into the United States Army Air Corps in 1942, and remained there until February of 1946 when he was discharged from the service. Upon his discharge from the service, he was assigned as an employee of the United States in the Civil Service, to the Western Base Section of the Army Air Corps with headquarters in Paris. He remained there until 1948 when he was assigned to Frankfurt, Germany and worked in the headquarters of the United States Army, Europe, for Deputy Chief of Staff, Logistics. He remained there until 1953 when he resigned and returned to the United States. Upon return to the United States, and after approximately 90 days, he accepted employment in the Office of the Directorate of Procurement and Production, in the office of the Air Staff, Headquarters, in the United States Air Force, Washington, D.C., as Project Officer in the Communications Electronics Division. In 1955, when the Directorate of Material Programs was established in the office of the Deputy Chief of Staff, Material, Headquarters, United States Air Force, he was assigned to that Directorate in the Division of Communications and Electronics, where he ultimately became civilian chief of that division. In November of 1958 he resigned to accept employment with the Philco Corporation. During the period of his service in the Army Air Corps and his employment in the Army Air Force and with the United States Air Force, he became familiar with Department of Defense electronic equipment use and procurement and held several security clearances. The grade of these clearances was "secret" until in 1949, when he was processed for a "top secret" clearance. When he left Europe, this clearance was automatically dropped. When he

went to work for the Air Staff, he obtained and held a secret clearance for approximately a year, and then was granted, again, a top secret clearance which he held until he left to take employment with Philco in November of 1958.

3. Plaintiff Becker's first employment with Philco Corporation was as Assistant Regional Manager, Eastern Region, Marketing Department, assigned to the Washington office which necessitated his dealing with the Federal Government on Government contract matters. In May of 1959 he became Regional Manager of the Marketing Division which position he continued to hold until he was transferred to Philadelphia on July 17, 1962. When Plaintiff Becker became an employee of the Philco Corporation, it was necessary that he make application for an Industrial Security Clearance which was granted at the level of secret, at first, and subsequently increased to top secret. In the positions held by Plaintiff Becker during his continued employment by Philco Corporation, a security clearance was a sine qua non of continued employment.

4. The occupation of representing contractors with the Government of the United States in their contractual dealings with the Government has become a specialized occupation, due to the special types of knowledge that persons engaged in this occupation acquire concerning the procurement policies and contract inspection and administration practices of the Federal Government. This is true whether such employees occupy managerial positions or, as they are sometimes known, sales representative or sales engineer positions. Plaintiffs, in this regard, by 1963, had achieved status as employees in the cate-

gory of government sales engineer or sales representative, and as managers of government contracting divisions of contractors engaged in the business of manufacturing or otherwise furnishing supplies, services, and equipment to the Government of the United States. In addition to that, Plaintiff Becker had acquired a special expertise in the electronics and communications area which qualified him particularly for his managerial position with the Philco Corporation.

5. During the first six months of the year 1962, one Patricia Poole, an employee of the Philco Corporation, in the Washington office managed by Plaintiff Becker, served as Assistant Security Officer and as Acting Security Officer for the office. She was discharged by Plaintiff Becker in June of 1962. On or about the 17th day of July 1962, after she had been discharged, Patricia Poole wrote a letter to the Security Officer of Philco Corporation in which it was apparently alleged, amongst other things, that Plaintiff Taglia had brought a document with a security classification on it into the Washington office in February of 1962, had cut the security classification from it, and had then returned it to its source, all in violation of the Industrial Security Regulations which would have required that such a document be logged in and returned to the Government or otherwise handled in accordance with the regulations. Apparently she also charged that in March of 1962 Plaintiff Taglia brought another document into the office, one not marked as classified information, but in her opinion containing classified information; that he had had her copy parts of it and turn it over to the Planning Director of Philco Corporation. Her letter appar-

ently also alleged that Plaintiff Becker was aware of these violations and had in some way or another either participated in or consented to the mishandling of them. Following the receipt of this letter, Philco's Security Officer, Transue, came to Washington, in August of 1962, to make an investigation concerning the allegations made in the Poole letter regarding alleged violations of the Industrial Security Regulations. He reported the results of his investigation. A memorandum with reference to this report was written by assistant counsel Berry of the company, an employee of the company, to the general counsel Nolte, an employee of the company, on August 16, 1962. Subsequently, meetings were held in the offices of the president of Philco Corporation on August 21, 1962 at which time it was decided to "discuss" the allegations with Plaintiffs Becker and Taglia separately. Such discussions were held with Plaintiffs, separately, on August 22, 1962. Following those discussions, it was decided, tentatively, to continue the employment of both of them unless there was "further evidence to justify a review of this decision". A report of these meetings was written by Berry to Nolte. No copy of this memorandum was ever given to Plaintiffs, nor were they asked to concur in the matters therein set forth and attributed to them. Subsequently, Berry discussed the allegations with Robert L. Applegate, of the Office of the Secretary of Defense. On October 23, 1962 he forwarded to Mr. Applegate an incomplete copy of the report dated August 29, 1962 concerning the August 22 and 23, 1962 meetings, which he called an "extracted" copy "with asterisks indicating the deletion of nonapplicable material".

6. In the meantime, the March 1962 document which was found in the possession of the Planning Director of the Philco Corporation, was classified by the Philco Security Officer, Transue, as "secret" and turned over to the cognizant Government security representative. Subsequently, the matter was referred to the FBI which made an investigation. Plaintiff Becker contended that he knew nothing concerning the source of the two documents, and has always steadfastly maintained that he never saw the March document. The January document, which Plaintiff Taglia states was returned to McGinty of North American, who gave it to him in the first place, could not be produced. Copies of it had not been made by Poole or Taglia, and McGinty denied furnishing any such document. McGinty did not deny giving Taglia the March document. At the time that Plaintiff Taglia was questioned by the representatives of the Federal Bureau of Investigation, he refused to state the source of the two documents. He did furnish a statement, in which he asserted that, if he were satisfied that the security of the United States was involved, he would furnish the name of the supplier of the documents. There isn't any doubt that McGinty furnished the March 1962 document, and that, as furnished, it was not marked as a classified document. It is also clear that both documents contained nothing but budgetary information. The exact nature of the March 1962 document is not a matter of record, as the Federal Bureau of Investigation and the Defendant refused to produce the document at the hearing.

7. On January 23, 1963 Plaintiff Taglia was notified by the Navy Department that pursuant to Department of Defense Directive 5220.6, entitled the Industrial Personnel Access Authori-

zation Review Regulation, of July 28, 1960, his secret access authorization (security clearance) to Army, Navy and Air Force information was suspended, effective immediately. Plaintiff Taglia demanded that action be taken by the Secretary of Defense with reference to such suspension and that such suspension be lifted, or that immediate proceedings be instituted under the regulation, looking towards the lifting of such suspension. On or about the 7th day of March 1963 Plaintiff Taglia, having obtained no answer to the demand for immediate proceedings instituted suit in this Court for an injunction. This action was voluntarily dismissed when the Defendant agreed to issue statements of reasons as required by the regulations and to grant a prompt hearing. Subsequently, on March 21, 1963, the statement of reasons was issued to Plaintiff Taglia together with a formal notice of suspension effective immediately. On May 7, 1963, a statement of reasons was issued to Plaintiff Becker together with a notice of suspension of his top secret access authorization, effective immediately.

8. As a result of these suspensions, Plaintiff Taglia lost his position with Melpar, Inc. and Plaintiff Becker was discharged by Philco Corporation. Their access to classified information was essential to employment by those two concerns. Similarly, neither Plaintiff was able to obtain employment with any other person, firm, or corporation engaged in the manufacture or supplying of equipment, supplies, or services to the United States Government. A security clearance, that is, an authorization to have access to classified Government information, was essential to employment in their chosen field of representation of government contractors.

9. Plaintiffs, although believing and consistently stating that the proceedings did not provide for due process, nevertheless complied in all respects with the applicable Department of Defense Directive 5220.6, the Industrial Personnel Access Authorization Review Regulation, dated July 28, 1960, a copy of which is attached to the Motion for Summary Judgment, as Exhibit C. Hearings were held before the Washington Industrial Personnel Access Authorization Field Board, as is detailed in the transcript of proceedings and testimony attached to the Motion for Summary Judgment herein as Exhibit A and A-I respectively. The notices of suspension, statements of reasons, and answers of the Plaintiffs, upon which these proceedings were based, are indexed and attached to the Motion for Summary Judgment as Exhibit B. Plaintiffs also went through an oral argument before the Central Industrial Personnel Access Authorization Board, after the report of the Field Board had been forwarded to that Board and it had proposed to act adversely with reference to Plaintiffs' security clearances, although Plaintiffs were not permitted to see, examine, or obtain any information with reference to the nature of that report. After the final decision of the Central Board, Plaintiffs sought to reopen the case when they thought they were in a position to obtain copies of the Poole letter, all as detailed in Exhibit E to the Motion for Summary Judgment. Plaintiffs also requested that the Secretary of Defense personally review the case and reverse the decision. This was denied. See Exhibit E to the Motion for Summary Judgment.

10. The final decision of the Defendant's representatives in this case, revoked both Plaintiffs' security clearances.

As a result of this, Plaintiffs have at all times since the suspension of their security clearances, been unable, and are still unable, to obtain employment with persons, firms, or corporations engaged in the business of contracting with the Federal Government to manufacture or otherwise supply goods, services and equipment to the Federal Government, their chosen field of occupation.

11. In revoking the security clearances of the Plaintiffs, the Defendant did not accord to Plaintiffs that due process of law essential to the valid deprivation of the property right they had in their chosen field of employment and particularly in their positions with Melpar, Inc. and Philco Corporation respectively, in the following respects:

a. The Defendant did not provide for the subpoenaing of witnesses. All he or his representatives could do was to issue "invitations" to witnesses to attend and be examined.

b. Neither the Defendant nor his representatives, in this case specifically, John T. Roche, Esq., sitting as the Washington Field Board, under the provisions of Department of Defense Directive 5022.6, dated July 28, 1960, had power to administer the oath to witnesses and instead merely "warned" them of the applicable provisions of Section 1001 of Title 18 of the United States Code. This inability, and this warning were used in lieu of the oath, during all of the proceedings looking to the revocation of Plaintiffs' security clearances in this case, where the testimony of witnesses was adduced and witnesses were cross-examined.

c. Not having the power to compell the attendance of witnesses nor to administer the oath, the Defendant, and his representative, the "Field Board" were unable to compell witnesses to answer questions or to produce documentary evidence. As a result, cross-examination by Plaintiffs' counsel of Patricia Poole was severely limited as she refused to produce the July 17, 1962 letter, or to answer any questions concerning it.

d. This same inability to compell witnesses to answer questions or to produce documents, was used by the employees of Philco Corporation to refuse to produce the Poole letter, to answer any questions concerning it, to produce the Berry report of August 16, 1962 or to produce the entire Berry memorandum of August 29, 1962, the "extracted" version of which was used by the Defendant in the proceedings looking to the revocation of Plaintiffs' security clearances.

e. This same inability was also used to permit the Defendant's witness, Transue, to avoid turning over the report he made to Philco Corporation and permitted the Philco witnesses to refuse to supply the Transue report.

f. The inability of the Hearing Officer to compell the testimony of witnesses and the production of documents, resulted in the refusal of the FBI witness, Byrnes, to produce the document he alleged

was the March 1962 document do that it could be examined as to its exact nature, and the nature of its contents. Instead, the witness was permitted to testify generally as to what it contained, and that, with minor exceptions, it was similar to a Department of Defense document previously marked secret.

g. The Defendant treated the proceedings as non-adversary in nature, but as investigatory solely.

12. Although the testimony was taken by the "Field Board", he made a report thereon to the Central Board, and although Plaintiffs had the right to file briefs and to oral argument before the Field Board, Plaintiffs were not entitled to and were not permitted to examine the Field Board report and were forced to appear before the Central Board, which issued the final decision, without benefit of the report of the Field Board, nor opportunity to point to errors therein or to determine the factual basis for findings. Thus, the Central Board which decided the case did not hear it.

[Caption Omitted in Printing]

INDEX TO EXHIBIT D --
(ATTACHED)

Taglia Case

(1) Letter of October 8, 1964 from Deputy Assistant Secretary of Defense, Security Policy, to Hart, Moss & Tavenner as attorneys for James Jude Taglia - Tentative Decision.

(2) Letter of October 16, 1964 from Hart, Moss & Tavenner (de Seife) to Deputy Assistant Secretary of Defense, Security Policy, in reply to (1) above.

(3) Letter of October 28, 1964, Deputy Assistant Secretary of Defense to Hart, Moss & Tavenner, in reply to (2) above.

(4) Letter of November 18, 1964 from Hart, Moss & Tavenner (de Seife) to Deputy Assistant Secretary of Defense in reply to (3) above.

(5) Letter of November 24, 1964 from Acting Director, Office of Industrial Personnel Access Authorization Review, Office of Assistant Secretary of Defense, to Hart, Moss & Tavenner, setting December 2, 1964 for oral argument.

(6) Letter of December 7, 1964 from Director, Office of Industrial Personnel Access Authorization Review, Office of Assistant Secretary of Defense, transmitting a copy of the transcript of the oral argument before the Central Industrial Personnel Access Authorization

Board on December 2, 1964 together with the copy of the transcript.*

(7) Final Decision Letter of December 18, 1964 from from Deputy Assistant Secretary of Defense, Security Policy, revoking Plaintiff Taglia's Security Clearance (Access authorization).

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*Copies of the transcripts are being filed with the original of this Exhibit. As the Defendant has the originals, no copies are attached to the copy of the Motion and Exhibits served on Defendant.

EXCERPTS FROM TRANSCRIPT
[Part of Exhibit D(6) (Dec. 2, 1964)]

* * *

[3] Three, that the Board formally acknowledge that Applicant is not seeking access authorization but rather is seeking to have revocation of an access authorization rescinded.

* * *

[12] Mrs. Pool, in her testimony before the Field Board, Mr. Roach examined her on it, testified that it was secret. Now, Mr. Davis has made the statement, in his brief, that Mrs. Pool was subjected to strong or vicious, or whatever the words are, cross examination, and this is not so because a reading of the record reveals we never did have an opportunity to cross examine Mrs. Pool effectively. Every time Mrs. Pool, who, incidentally, was accompanied by her own lawyer at these proceedings, every time we asked her a question, her memory suddenly failed or she refused to answer upon advice of Counsel and her refusal were time and again supported by Government Counsel.

* * *

[14] It is very difficult, as I said at the beginning, [15] for us to argue the case, where we do not know what findings the Examiner made. As lawyers, you appreciate my predicament. To me, to argue Mr. Taglia's innocence, for it, this time, is a futile exercise, as I said before.

I don't know what to address myself to. Argument in a vacuum is not what we consider as a professional approach to this question.

Now, I will say this, that from a legal viewpoint, certainly, due process has not been accorded Mr. Taglia, regardless of the amounts of pages

of record that are on Mr. Davis's desk, regardless of what things are named, because due process, as you, Mr. Chairman and you other Members of the Board know, is not a question of form, it is a question of substance.

In any event, Mrs. Pool's testimony, under any criteria of our understanding of the law, should have been stricken from the record when she refused to answer questions or cross examination. I cite to you Wigmore on Evidence, Section 1361, Volume V. This seems to be the standard law. Regardless of how informal this proceeding is, I do believe that the Examiners, in the first instance, the Field Board later on, must conform to certain criteria set out in our legal system in order to make findings and they must accord the proper weight to testimony that was given to them before this Board.

[16] To fly into the face of evidence, such as in the case where this Board found that Mr. Taglia did not show document A to John O'Neil, Robert Burns, when these men have testified this, that they were quite sure this was the document they had seen, one can only conclude one thing, either, one, the Board did not look at the evidence as a whole, and chose to take Mr. Davis's brief and put full credence in what he said, he believed to be the truth, or two, one has to go even further and, on my conjecture, and again, these are warranted, because we do not have any Field Record before us so this is not—one must then conjecture this goes further. It would be embarrassing for the Government to acknowledge the fact Mr. Taglia had shown document a to Mr. O'Neil and Mr. Burns, when these men supported his testimony that this document was not officially classified.

There is contradictory testimony on the type of classifications throughout Mrs. Pools testimony. She said, at one point, it was thermofaxed and

asn't the case. Counsel stipulated, with us, the thermofax would up the red class fication stamp.

This whole case has been a tissue of charges unsupported, with Mr. interest throughout, woven throughout this case, as proving this this man was guilty and he was guilty from the first time he out this case and every effort that we, as lawyers, in trying to further and protect our client's interest to the best of our ability, step we have tried to undertake has either been misrepresented in cord, as a matter of personality, which it is not, or if it hasn't been presented in the record, or misinterpreted, was, as I said before, defeated effectively by this so-called informal nature of this proceeding, you are not allowed to cross examine effectively, because the witness appear, allegedly, voluntarily, and they only answer such questions those to answer.

This is why I say it is your responsibility to look much more beyond the regulations of the Department of Defense, beyond the record, and to really ascertain whether this man who sits at my left is really the type of person who would commit the things that only one person says did commit—only one, really. All of the rest in triple, quadruple, hearsay. The Philco report to the Government was a truncated report, the proceeding.

There is no question, in my mind, that Philco has too much at stake in Government contracts, and its officers were not about to shrink before anything necessary to save the corporate defense. This has been done before, and I am sure you men are not that naive to think this does not happen.

I say, because it is impossible for me to argue the case effectively, Mr. Chairman, Members of the Board, that I [18] have asked you, and I thank

you for your courtesy in affording me the privilege of having Mr. Taglia tell you his own argument so you can examine him, if you wish. This is basic to this whole proceeding, you try to get to the truth, and I am confident that you will try to get to the truth regardless of what very effective argument Mr. Davis will make as to the courage of Mrs. Pool, as to the implausible situation where a few corporate officers get together to save their own hides and those of the corporation.

I just point to some facts in this case which should raise questions in your minds, and these are the following:

Why did Mrs. Pool refuse to show this letter? Did it, in fact, contain libelous matters? As you know, truth is a complete defense to libel, besides refusing the letter.

Two, why did the Government interfere at all costs in a State Court, which is unheard of, with our private law suit, in order to prevent the woman from having to give up that letter? Did the Government have, at stake, something it didn't want to come out in this case? Why was Mr. Davis so interested?

Why is it that Taglia and Becker are the only ones involved in this episode when we know, from testimony in this regard, that a man came in who gave Taglia the documents A and B, whose wife was not cleared, who copied these documents. Nothing ever happened to these people, the Philco officers [19] who distributed document B, for most and part of it, who never did, in fact, focus on it being in any way classified until after things started happening, as a result of Mrs. Pool's husband's going to the F.B.I. These are the questions, I think, that ought to be answered to your satisfaction.

Why did Leona Cloutier, despite the cross examination of her own lawyer, the Government lawyer who brought her in as a Government witness, testify document A was confidential. Mrs. Pool had said it was secret all along. Mrs. Pool didn't even know whether the stamps were one stamp or two. Isn't the Government bound by its own witness's testimony?

I think, also, that you ought to give weight, the proper weight to testimony of people, on the one hand, who were subjected to effective cross examination, which was the case of Mr. Taglia, I think the record is complete. Mr. Davis is a very effective advocate, cross examination examiner, and the weight you should accord to somebody who, as soon as—Mrs. Pool, Transue, Berry—as soon as they were asked questions on cross examination, either refused to answer on some privilege, like Mr. Berry, or on the advice of Counsel, and every time they refused to answer, they were backed up by Mr. Davis.

These are the questions, I submit, you have to raise and answer to if you want to do the job that you are supposed to do and that I know you want to do.

* * *

[642-66, R.28]

CENTRAL INDUSTRIAL PERSONNEL ACCESS AUTHORIZATION BOARD

MEMORANDUM FOR DIRECTOR,

SUBJECT: Final Determintion in the Case of– 14 Dec 1964
TAGLIA, James Jude – CSD 63-131

DOB: May 24, 1924
POB: Chicago, Illinois
Extent Access Authorization: NONE (Secret until January 23, 1963, when authorization for access at any level was suspended by Department of the Navy.)
Access Authorization Requested: Secret.
Determination: Deny access authorization at any level.

* * *

On October 6, 1964, the Central Board, after consideration of Applicant's answer to the Statement of Reasons, the record of the proceeding before the Washington Industrial Personnel Access Authorization Field Board, at which Applicant appeared with counsel, briefs filed by respective counsel for Applicant and the Department of Defense, and the Field Board Report, determined tentatively that the granting of authorization to him for access to any information classified pursuant to Executive Order 10501 is not clearly consistent with the national interest. At the same time the Board announced that it proposed to find against Applicant with respect to each allegation, paragraph, and Criterion of the Statement of Reasons, except the following:

* * *

Applicant's counsel, after a brief personal attack upon Chief Department Counsel, concentrated his fire upon the credibility of the Department's witnesses, most particularly the witness Poole. Also, he called attention again to his inability to obtain production at the proceeding of the so-called "Poole letter", and to the declinations of two of the Depart-

ment's witnesses, viz., Poole and Berry, to answer certain questions put to them. It will be noted that those matters have been discussed at some length in the Field Board Report which, as specified hereinafter, we have approved and adopted.

* * *

This case is a companion to that of Leo George Becker, CSD 63-174, heard by the Washington Field Board intermittently over the period from June 25, 1963, to April 16, 1964. Through stipulation and assertions at the proceedings, Department Counsel and Counsel for the Applicants agreed that the entire record of the Field Board proceeding in the Becker case—comprised of some 3000 pages of transcript, plus voluminous exhibits—should be considered by the Field Board, and later by the Central Board, in making their respective findings, recommendation, and determination in instant case. It was further agreed that complete reliance would be placed upon the respective Boards to distinguish the evidence in the Becker case that was not applicable to Taglia (Stipulation; Becker Transcript, pp. 41-49; Taglia Transcript, pp. 57-62).

* * *

It follows, too, that in accepting the Testimony of Poole, Transue, et al, as presenting the true facts in this case, we conclude that Taglia and Becker have been deliberately lying throughout the proceeding.

Before concluding this memorandum we think it well to touch briefly upon the procedural aspects of this case. As pointed out by the Examiner in his Report, Counsel for Taglia (and Becker) maintained throughout the proceeding that the Applicants could not be accorded due process in a proceeding conducted pursuant to the controlling Regulation. Through vari-

ous motions and by other means, Counsel for Applicants continually raised procedural and administrative questions and elicited rulings in those areas. In the light of those efforts by Counsel for Applicants, the Examiner deemed it appropriate to submit as an attachment to his Report a list of the principal procedural questions raised by Applicants during the proceeding and the dispositions thereof. We have reviewed those matters carefully and we share the Examiner's belief that no prejudicial procedural error is reflected therein; nor do we discern any such error anywhere else in the extensive record before us.

DETERMINATION

Upon the basis of all the available information, the Central Board determines that the granting of authorization to Applicant James Jude Taglia for access to any information classified pursuant to Executive Order 10501 is not clearly consistent with the national interest.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,076

JAMES J. TAGLIA,

Appellant

v.

MELVIN R. LAIRD,
Secretary of Defense,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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Washington, D. C. - THIEL PRESS - 202 - 393-0625

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NOTE

Record references will include the Record in the Becker case, No. 23077. These cases were consolidated for hearing below and the transcripts of the hearing before the Examiner, Field Board, were applicable to both cases by stipulation (643-66, R. 10, Exhibit A–Stipulation). For these reasons the record in the Becker case may include evidence applicable to the Taglia case, and vice versa, and are cross-referenced in the docket entries for each case. The case in which the record appears will be indicated herein by reference to the District Court Civil Action number. The Becker case number was 643-66. The Taglia case number was 642-66.

TABLE OF CITATIONS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,076

JAMES J. TAGLIA,

Appellant

v.

MELVIN R. LAIRD,
Secretary of Defense,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF ISSUES*

Did the administrative procedures, on the basis of which Appellee[1] revoked Appellant's industrial security clearance[2], provide a full

*This case has not been heard by this Court previously. Although Appellant has elected to defer the preparation and filing of the appendix, and a statement of issues is not necessary, Appellant here supplies such a statement for the purpose of emphasizing Appellant's contentions.

[1] At the time of the occurrences which are the subject of this appeal, the Secretary of Defense was Robert S. McNamara.

[2] Department of Defense Directive 5220.6 printed as Addendum No. 1 hereto (643-66, R. 10; Exhibit C to Appellant's motion for summary judgment),

and fair hearing consistent with traditional concepts of due process of law where (a) the hearing officer had no power to compel the attendance of witnesses by subponea and could not, therefore, compel the witnesses to produce documents or to answer questions on cross-examination; (b) witnesses who testified against Appellant with respect to charges of violation of industrial security regulations, refused to answer questions relevant to their direct examination and to produce relevant documentary evidence; and (c) the Executive Order under the authority of which Appellee purported to act specifically prohibited revocation of Appellant's industrial security clearance unless the opportunity for cross-examination was accorded to him.

2. Did Appellant, whose Counsel repeatedly object to the nature of the proceedings, and to the lack of authority and impotence of the hearing officer to compel witnesses against Appellant to answer questions and produce documents on cross examination, waive the objections made to the administrative procedures on the basis of which Appellee revoked Appellant's industrial security clearance, merely by reason of failing to *formally* move that the testimony of the recalcitrant witnesses be stricken.

3. Did the District Court err in granting Appellee's cross-motion for summary judgment on the ground that the findings of the board designated by Appellee to hear and recommend action to him, on the question of revocation of Appellant's industrial security clearance, was supported by ample evidence even if the testimony of the other witnesses who were not compelled to answer on cross-examination is excluded, where Appellant in the declaratory action below did not

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is entitled "Industrial Personnel Access Authorization Review Regulation". This Regulation refers to what are commonly known as "security clearances" as "access authorizations". It also treats the holder of a security clearance, whose clearance is being considered for revocation as an "Applicant". In this brief Appellant's access authorization will sometimes be called a "security clearance" and Appellant will nowhere by referred to as "Applicant".

seek judicial review of the action of Appellee on the ground that the evidence did not support the related board decision; but only on the grounds of lack of due process and lack of authority.

REFERENCES AND RULINGS *

STATEMENT OF THE CASE

1. Nature of the Case, Course of Proceedings and Disposition in the Court below.

This is an appeal from a judgment of the United States District Court for the District of Columbia (642-66, R. 30), denying Appellant's motion for summary judgment (643-66, R. 10) and granting Appellee's motion for summary judgment (642-66, R. 17).

Appellant's action (642-66, R. 3) against Appellee, was one seeking a judgment:

> "(a) Declaring the acts of Defendant in suspending and revoking Plaintiff's Secret Access Authorization to information classified by Defendant, illegal, void, null and of no effect.
>
> (b) Requiring the Defendant to restore the Plaintiff's security clearance and Secret Access Authorization, to information classified by Defendant, as an employee of Melpar, Inc."

Appellant's complaint (642-66, R. 3) alleged that the hearing accorded Appellant, on the basis of which the Central Industrial Personnel Access Authorization Board designated by Appellee recommended suspension of Appellant's security clearance, was not a due process hearing, stating *inter alia* that the hearing officer had no power to issue subpeona's to compel witnesses against Appellant to answer questions or to produce documentary evidence, and that in this case (642-66, R. 3, Par. 8(b)(4))–

> ". . . .this lack of authority denied to the Plaintiff the right to require his accusers to produce documentary evidence, which they refused to produce during the

* The order of the United States District Court for the District of Columbia from which this Appeal is taken was dated March 17, 1969 and filed with the Clerk of the Court below on March 19, 1969. The order denied Appellant's Motion for summary judgment (and that of Leo George Becker in CA No. 643-66, which was consolidated with Appellant's case for hearing below) and granted Appellees cross motion for summary judgment. The prefatory part of the Order sets forth the Court's opinion or ruling on the basis of which the order was made. The order appears in the Record at R-30.

> hearing, and to answer questions, which they refused to answer, during the hearing".

As there was no genuine issue of fact with regard to the occurrences of which Appellant complained, Appellant moved for summary judgment[3]. Appellee filed a cross motion for summary judgment. Appellee's motion was based upon its contention that the decision of the Board accorded a fair hearing and that the evidence of record was sufficient to support the administrative action. Appellant objected to a motion for summary judgment on the basis that the evidence of record was sufficient to support the administrative action, as neither the complaint nor the answer at that stage of the proceedings raised such an issue. Appellant at that time was only seeking a declaratory judgment on the grounds of due process and lack of authority in the Appellee to revoke his security clearance in a case where the Appellee had not accorded to him the opportunity for cross examination required by the executive order[4] under which Appellee purported to act. The Court overruled this objection. The Court then denied Appellant's motion for summary judgment on the grounds that the administrative procedures adopted by Appellee provided a full and fair hearing with ample opportunity to cross-examine witnesses as required by *Greene v. McElroy*, 360 U.S. 474 (1957), and that although the hearing officer may have been unable to compel testimony on cross-examination as to certain questions, Appellant could have protected his rights by a motion to strike but elected not to do so. The Court ignored Appellant's contention that the executive order under which Appellee purported to act did not confer upon him the authority to revoke Appellant's security clearance in the absence of an effective provision in the regulations for the re-

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[3]See Footnote 5, *infra*.

[4]Executive Order 10865 reproduced as a part of Addendum No. 1. to this Brief.

quired opportunity to cross-examine witnesses against him. The Court granted Appellee's cross motion for summary judgment on the ground that the findings of the Board upon which Appellee acted were supported by ample evidence even if the testimony of the witnesses who were not compelled to answer on cross-examination, is excluded.

2. Facts Relevant to This Appeal.[5]

In 1956 while Appellant was employed as a government field representative of the Underwood Corporation, in Washington, D.C., he applied for and received a "secret" security clearance pursuant to the provisions of Department of Defense Directive 5220.6, entitled "Industrial Personnel Security Review Regulation", dated February 2, 1955.[6] He continued to hold this security clearance until January 23, 1963 when it was suspended by Appellee. During this period Appellant had left Underwood and had become a sales representative of Autonetics, Division of the North American Aviation Corp-

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[5]Appellant's motion for summary judgment was supported by a statement of the material facts (643-66, R. 10) as to which Appellant contends there was no genuine issue. As required by Rule 9(h) of the Rules of the United States District Court, District of Columbia, Appellee failed to file a statement of genuine issues as to Appellant's statement and Appellant's statement must, therefore, be taken as true. As to factual statements contained in this statement which have been so admitted, no record reference will be made. Record references will only be made if the fact alleged was not a part of Appellant's statement of material facts and is otherwise supported by the record.

[6]On July 28, 1960, Department of Defense Directive 5220.6 entitled "Industrial Personnel Security Review Regulation" was cancelled and a new Department of Defense Directive No. 5220.6 entitled "Industrial Personnel Access Authorization Review Regulation" was issued. A copy of this Regulation and Executive Order No. 10865 upon which it was based is reproduced as Addendum No. 1 to this Brief. Also reproduced is Executive Order 10909 which amended Executive Order 10865 on January 17, 1961.

oration where he was employed until January of 1962. He then became a senior Government Sales Engineer handling Air Force programs for the Philco Corporation, working out of Philco's Washington office. In December of 1962 Appellant left Philco Corporation and accepted a position with Melpar, Inc. Upon the suspension of his security clearance, and its subsequent revocation Melpar, Inc. terminated his employment. A security clearance was a *sine qua non* of his continued employment by any Defense contractor as a sales representative or engineer. He has not to this day been able to obtain employment with a business concern as a government sales representative or sales engineer.

The occupation of representing contractors with the Government of the United States in their contractual dealings has become a specialized one, due to the special types of knowledge the persons engaged in this occupation acquire concerning procurement policies, and contract inspection and administration practices of the Federal Government. Appellant, in this regard, by 1963 had achieved a specialized status as a Government Sales Engineer or Sales Representative of contractors engaged in the business of manufacturing or otherwise furnishing supplies, services and equipment to the Government of the United States.

Prior to the revocation of Appellant's security clearance and during the first six months of the year 1962, one Patricia Poole, a secretary employed in the Washington office of the Philco Corporation, served as Assistant Security Officer, or as Acting Security Officer for that office. She was discharged by the Manager of that office in June of 1962. On or about July 17, 1962, after she had been discharged, she wrote a letter to the Security Officer of Philco Corporation, one Transue, in which it was apparently alleged, amongst other things, that Appellant had brought a document into the Philco Washington office with a security classification on it and had cut the security classification from it and then returned it to its source, all

in violation of Department of Defense Security Regulations which would have required that such document be logged in and returned to the Government or otherwise handled in accordance with the regulation. Apparently she also charged that in March 1962 Appellant brought another document into the office, one not marked as classified information, but in her opinion containing classified information, and that Appellant had asked her to copy parts of it and turn it over to the Planning Director of Philco Corporation, one Bailey, in the Philadelphia offices of the Company.[7] Following receipt of this letter, Philco Security Officer, Transue, came to Washington, in August of 1962 to make an investigation concerning the allegations made in the Poole letter. He made a written report of his investigations. A memorandum with reference to this report was written by an Assistant Philco Counsel, one Berry, to the General Counsel of the Company, one Nolte, on August 16, 1962. Subsequently, meetings were held in the offices of the President of the Philco Corporation on August 21 and 22, 1962 at which time it was decided to "discuss the allegations" with the Manager of the Washington office and Appellant, separately. Such discussions were held at meetings in Philadelphia on August 21 and 22, 1962. Following those discussions it was decided, tentatively, to continue the employment of Appellant unless there was "further evidence to justify review of this decision". A report of these meetings was written by Berry although he did not attend all of the meetings. No copy of this report was ever given to Appellant nor was he asked to concur in the statements of fact therein set forth and attributed to him. Subsequently, Berry discussed the allegations with Robert L. Applegate, of the office of Appellee. On October 23, 1962 he forwarded to Mr. Applegate an incomplete copy of the report dated August 29, 1962 (concerning what Berry called the August 22 and 23, 1962 meetings) which he called an "extracted copy" "with asterisks indicating the deletion of non-applicable material". (643-66, R. 10, Exhibit B).

[7] Although she was then Acting Security Officer, she took no action with reference to the documents at that time (643-66, R. 10, Exhibit A).

In the meantime, the March 1962 document had been found in the possession of the Planning Director of the Philco Corporation. It was unmarked as to any classification. Transue immediately classified it as "secret" and turned it over to the Government. Subsequently the matter was referred to the F.B.I. which made an investigation. Appellant alleges and testified that *both* the January document and the March document were obtained from a former North American Aviation fellow employee, one McGinty. McGinty did not deny giving Appellant the March document. He denied giving the January document to Appellant, and since Appellant alleged that he had returned the January document to McGinty, the January document never was identified at the hearing as other than one containing unclassified "budgetary" information. When Appellant was first questioned by representatives of the Federal Bureau of Investigation he refused to state the source of the two documents, asserting in writing, that if he were satisfied that the security of the United States was involved, he would furnish the name of the source of the documents.

The exact nature of the March 1962 document is not a matter of record, as the Federal Bureau of Investigation and the Defendant refused to produce the document at the hearing,[8] being satisfied to offer testimony of the F.B.I. witness that he had compared the March 1962 document with a document marked "secret" in the offices of the Secretary of Defense, and that they were virtually identical.

On January 23, 1963 Appellant was notified by the Navy Department that pursuant to DOD Directive 5220.6, *supra*, his secret security clearance to Army, Navy and Air Force Information was suspended, effective immediately. Appellant demanded that action be taken by Appellee with reference to such suspension and that such suspension be lifted, or that immediate proceedings be instituted

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[8] Addendum No. 2 hereto.

under the Regulation looking towards the lifting of the suspension. On or about the seventh day of March 1963 Appellant having obtained no answer to his demand for immediate proceedings instituted suit in the United States District Court in the District of Columbia for an injunction. That action was voluntarily dismissed when the Defendant agreed to issue the statements of reasons required by the Regulations and to grant a prompt hearing. Subsequently, on March 21, 1963, the statement of reasons called for by DOD Directive 5220.6, *supra*, was issued together with Appellee's formal notice of suspension, effective immediately. The statement of reasons was based generally on the Poole allegations concerning the January and March 1962 documents, the original refusal to furnish the name of the source of the documents to the FBI and the subsequent furnishing of that name after the issuance of the suspension order. (643-66, R. 10, Exhibit B.2).

Appellant, although believing, and consistently thereafter stating[9] that the proceedings did not provide due process, nevertheless complied in all respects with Department of Defense Directive 522.0.6. Hearings were sought and were held before the Washington Industrial Personnel Access Authorization Field Board, which proceedings were detailed in a transcript thereof. (643-66, R. 10, Exhibit A.6). Appellant sought and was permitted thereafter to orally argue his case before the Central Industrial Personnel Access Authorization Board, after the report of the Field Board had been forwarded to that Board and it had proposed to act adversely with reference to Appellant's security clearance. Appellant was not at that time nor at the time of the hearing before the Board permitted to see, examine, or obtain any information with reference to the nature of that report (See § IV. F. 1. of DOD Directive 5220.6; Addendum No. 1 hereto) The Central Board, based on that report, however, and after the oral argument, recommended to Appellee the revocation of Appellant's secu-

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[9] Addendum No. 2 hereto.

rity clearance, and Appellee thereupon finally revoked such clearance. In so doing, it said (643-66, R. 28, Memorandum of the Board For the Director OIPAAR, dated 14 December 1964) at page 4:

> "It follows, too, that in accepting the testimony of Poole, Transue, et al, as presenting the true facts in this case, we conclude that Taglia and Becker have been deliberately lying throughout the proceeding."

Apparently the Board paid no attention to the testimony of the polygraph expert that Taglia was telling the truth. (643-66, R. 10, Exhibit A).

It was not until after this action had been started and had been pending for some time that Appellee chose to supply Appellant's Counsel with a certified copy of the repor: of the Examiner, Washington Field Board, to the Central Industrial Personnel Access Authorization Review Board. At the time of the hearing on the motion for summary judgment in the District Court, a copy of this report was filed with the District Court Judge hearing the motions.[10]

Prior to and during the hearing before the Examiner, Washington Field Board, which resulted in recommendations to the Central

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[10]A copy of the report was filed with Judge Gasch by the Counsel for Appellee at the time of the hearing on the cross motions for summary judgment on January 28, 1969. When the order of the Court dated March 17, 1969 was mailed to Appellant's Counsel, what appeared to be that copy of the report filed by the Defendant in open Court was included. Appellant's Counsel promptly returned it to the Clerk of the District Court requesting that it be made a part of the record in this case. An examination of the record in this Court discloses that the report is recorded in the docket entries as having been filed on April 14, 1969 as Defendant's Exhibit A. (642-66, R. 32). But this Defendant's Exhibit A contains only the first twenty pages of the report and does not include the index to procedural matters which details Appellant's constant objection to the nature of the proceedings and the lack of due process. For this reason that portion is reproduced, from Appellant's certified copy, as Addendum No. 2 to this Brief.

Board to revoke Appellant's security clearance, the following procedural matters and difficulties occurred and were objected to (Addendum No. 2):

> a. Neither the Executive Order nor Department of Defense Directive 5220.6 nor any other applicable provision of law, gave the Examiner, Washington Field Board, the power to issue subpoenas to complete the attendance of witnesses and the production of documentary evidence. Instead, the Field Board and the Counsel for Appellee issued "invitations" to witnesses to attend and be examined.
>
> b. The Examiner, Field Board, did not have power to administer oaths to witnesses, and instead merely "warned" them of the applicable provisions of Section 1001 of Title 18 of the United States Code.
>
> c. The Examiner, Field Board, had no authority whatsoever and was impotent when it became necessary to compel witnesses to answer questions or to produce documents. The principle witnesses against Appellant were Patricia Poole, and Philco employees, Transue, Beck, Jones and Berry. Since the January and March documents came into the Philco Corporation office in Washington, during a period of time when Poole was the Security Officer, and should have, if her testimony was true with reference to those documents, been handled by her as classificied documents, which she did not, her letter written after she was discharged, obviously a "poison pen" was a highly significant indicator of the extent of her bias and prejudice and of her malice and motives and of the truth or falsity of her testimony. However, she refused to testify with respect to the letter, to answer any questions with respect to the letter or to produce the letter. Transue, who made an investigation and a report, not only refused to furnish the Poole letter, which was addressed to him, refused to answer any questions

with respect to it and refused to produce his report or to answer any questions concerning them. All of the Philco Corporation witnesses including Berry, refused to produce the Poole letter, the Transue report or the full report of the meetings prepared by Berry. Berry who prepared the memorandum of the meetings at which the matter was discussed in Philadelphia refused to produce his report and the full memorandum or to testify with reference to the omitted portions thereof on the ground of the attorney-client privilege, although he was at that time a Philco employee. Without the testimony of these witnesses there was no case whatsoever against Appellant with reference to either the January or the March document.

d. Government witness Byrnes the FBI Agent, testified but refused to produce the March document or answer any questions with reference to it, excepting to state that he had compared it with a "secret" document. Appellee refused to produce the March 1962 document and stated that it did not have the January document.

e. Although under the regulations, the decision was made by the Central Industrial Personnel Access Authorization Review Board, it based its decision on the report of the Examiner, Washington Field Board and Appellant was not permitted to see that report.

The transcript of the record of the hearing before the Examiner Washington Review Board contains repeated objections on the part of Appellant's Counsel, to the impotency of the Examiner on the question of subpoenas, the compelling of testimony of witnesses, and on the production of documents. At one point Appellant's Counsel moved that the proceedings be referred back to Appellee, because it was not possible to accord to Appellant the protections

of the provisions of Section 3 of Executive Order 10865.[11] See Addendum No. 1 hereto.

The same objections, that is, to the inability of the Examiner of the Washington Field Board to issue subpoenas, administer oaths and to compel the testimony of witnesses and production of documents were made in Appellant's argument before the Field Board after it had received the report of the Examiner. Washington Field Board for consideration by it *en camera.* (643-66, R. 10, Exhibit D(6), pp. 3-4, 15).[12]

In all instances Appellant's objections were overruled or ignored and the Board proceeded to make its decision on the basis of the testimony of Poole, Transue, Berry, Jones and Canfield, all Philco Corporation employees or former Philco employees, despite the fact that all of them refused to answer questions or to produce documents directly related to their testimony. See memorandum of the Central Board (643-66, R. 28), and the detailed report of Appellant's objections to the administrative procedure set forth in the report of the Examiner, Washington Field Board, reproduced as Addendum No. 2 hereto.

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[11]This motion was made in the companion case of Leo George Becker. However, since the stipulation of the parties in the proceedings (643-66, R. 10, Exhibit A-Stipulation) permitted the transcript in the Becker case to be offered and received in evidence in the Taglia case, it is considered that the same motion was made with respect to both cases.

[12]Note particularly the statement of Counsel on p. 15 that Poole's testimony "should have been stricken from the record when she refused to answer questions on cross-examination. I cite to you Wigmore on Evidence, § 1361, Volume V. This seems to be the standard law. Regardless of how informal this proceeding is, I do believe that the Examiner, in the first instance, the Field Board later on, must conform to certain criteria set out in our legal system in order to make findings and they must accord the proper weight to testimony that was given to them before this Board."

ARGUMENT

A. THE ADMINISTRATIVE PROCEDURES UPON THE BASIS OF WHICH APPELLEE REVOKED APPELLANT'S SECURITY CLEARANCE DID NOT PROVIDE APPELLANT WITH A FULL AND FAIR HEARING WITH AMPLE OPPORTUNITY TO CROSS-EXAMINE WITNESSES.

Executive Order 10865, of February 20, 1960 and the amendment thereto of January 17, 1961, resulted from the decision of the Supreme Court in the case of *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377. It's terms must therefore be construed in that light. (642-66, R. 17, Argument p. 4).

Section 3 of Executive Order 10865 (Addendum No. 1) states specifically, that except as provided in Section 9 of the Order–

> ". . .an authorization for access to a specific classification category may not be finally denied or revoked by the head of a department or his designee, including, but not limited to, those officials named in Section 8 of this Order, unless the applicant has been given the following:
>
> . . . . . .
>
> . . . .(6) An opportunity to cross-examine persons either orally or through written interrogatories in accordance with Section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant."

Section 4(a) states that an applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue "except that any such statement may re received and considered without affording such opportunity in the circumstances described in either of the following paragraphs. . . . ." None of the circumstances described in the following paragraphs apply to the situation here presented.

The exception provided as to Section 9 of the Order is not applicable here either. That authorizes the head of a department to deny or revoke access to a specific classification category if the security of the Nation so requires, but only when the head of the department determines that the procedures prescribed in Section 3, 4 and 5 cannot be invoked consistently with the National security. No such determination was made in this case.

A careful examination of DOD 5220.6, *supra*, (Addendum No. 1) fails to disclose any provision whatsoever which would assure to what the Directive insists upon calling "applicants" the full right to cross-examination of witnesses against them. Nor is there any provision therein for the issuance of subpoenas nor the administering of oaths. On the contrary Section IV. E. 1.s. merely states that witnesses appearing before the Field Board shall testify subject to the provisions of Sec. 1001, Title 18 U.S. Code. It adds that they shall be informed that the Section makes it a criminal offense, punishable by a maximum of five years imprisonment, $10,000 fine or both to knowingly and willfully make a false statement or representation to any department or agency of the United States as to any matter within the jurisdiction of any department or agency in the United States. Written interrogatories, it adds, must be sworn to before a notary public or other official authorized to administer oaths. It is strange that a proceeding so important to the livelihood of Appellant would not provide for its hearing examiners the power to administer oaths and to require witnesses to answer questions.

However the significance of the provisions of the Executive Order with reference to the right of confrontation and cross-examination stand out clearly when the Supreme Court's pronouncements in *Greene v. McElroy*, *supra*, are carefully examined against it.

In *Greene v. McElroy, supra*, Greene, as did Taglia in this case, had lost his security clearance. Greene contended that he had been denied liberty and property without due process of law in contravention of the Fifth Amendment. There, as here (643-66, R. 10, Statement of Material Facts as to Which There is no Genuine Issue), the Secretary of Defense admitted, as he had to, that the revocation of the security clearance caused the loss of the petitioner's job, and seriously affected, if not destroyed, his ability to obtain employment within his chosen field of endeavor. The Secretary, however, contended that although the right to hold specific private employment and to follow a chosen field of endeavor free from unreasonable government interference came within the liberty and property concepts of the Fifth Amendment, the admitted intereferences were indirect by-products of necessary governmental action to protect the integrity of secret information and hence were not unreasonable. He also argued that even if Greene had been restrained in the enjoyment of constitutionally protected rights he was accorded due process of law in that he was permitted to utilize those procedural safeguards consonant with an effective clearance program, in the administration of which the identity of informants and their statements are kept secret to promote an unimpaired flow to the government of information concerning the person's conduct.

The Supreme Court, however, avoided the constitutional question and decided the case on the narrower ground of "authorization", finding that it did not need to answer the questions posed by the Secretary. The Court said (360 U.S. 474, at page 493):

> "The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained

> in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguard of confrontation and cross-examination."

The importance which the Court in the *Greene* case placed upon the right of confrontation and cross-examination is illustrated at pages 496, 497 of 360 U.S., as follows:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindicativeness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots . . .This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases (citations omitted), but also in all types of cases where administrative and regulatory actions were under scrutiny. . . .*Carter v. Kubler*, 320 U.S. 243; *Reilly v. Pincus*, 338 U.S. 269 . . . . . "

The Court then went on to quote with approval the language of Professor Wigmore, Wigmore on Evidence (3d ed. 1940), Vol V, § 1367, wherein he states:

> ". . .The belief that no safeguard for testing the value of human statements is comparable to that furnished

by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been proved and sublimated by that test, has found increasing strength in lengthening experience."

The Court then said:

"... We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long accepted notions of fair procedures. Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. Cf. *Watkins v. United States*, 354 U.S. 178; *Scull v. Virginia*, 359 U.S. 344. . . . . ."

And at pp. 507, 508, 360 U.S. the Court said:

"Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See e.g. *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Dismuke v. United States*, 297 U. S. 167, 172; *Ex parte Endo*, 323 U.S. 283, 299-300; *American Power Company v. The Securities and Exchange Comm'm*, 329 U.S. 90, 107-108; *Hannegan v. Esquire*, 327 U.S. 146, 156; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49. Cf. *Anniston Mfg. co. v. Davis*, 301 U.S. 337; *United States v. Rumely*, 354 U.S. 41. These cases reflect the Court's concern that

> traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's law makers, even in areas where it is possible that the Constitution presents no inhibition.

The majority opinion of the Court in the *Greene* case, written by Chief Justice Warren, then concludes by pointing to the limitation placed upon Greene's work opportunities after a hearing which failed to comport with the Court's traditional ideas of fair procedure. stating in conclusion (at page 508, 360 U.S.):

> ". . . .The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether Congressional action is necessary, or what the limits on Executive or Legislative authority may be. We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination."

The identical situation is presented here. Since the decision in *Greene v. McElroy* there has been no additional legislative action which would have authorized the Secretary of Defense to deprive Appellant in this case of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination. Of more significance, however, is the fact that *there has been no explicit authorization* from the President which empowered the Secretary of Defense to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-

examination. On the contrary, the President by Executive Order 10865 (Addendum No. 1) specifically enjoined Appellee by stating, in § 3 and § 4 of the Executive Order, that a security clearance was not to be finally revoked unless the holder thereof had been given an opportunity to cross-examine the persons who made oral or written statements adverse to the holder related to the controverted issue. In amending Executive Order 10865, by Executive Order 10909 of January 17, 1961 the President authorized the heads of the Departments concerned to issue, in appropriate cases, invitations and requests to appear and testify in order that the Applicant could have the opportunity to cross-examine as provided by this Order. However, an invitation may be refused, rejected, or ignored. A subpoena cannot. No power of subpoena was provided by the Executive Order or otherwise. Thus, the Secretary, the Examiner, Washington Field Board, and the Central Board were without power to compel the attendance of witnesses and to require witnesses to answer questions and produce documentary evidence. For this reason, the Amendment to the Executive Order added nothing. Furthermore, a witness who accepted the "invitation" and was present, had the full power to refuse, with impunity, to produce documents or to answer questions on cross-examination. This we shall see was not a true opportunity for cross-examination.

B. THE MERE PRESENCE OF WITNESSES WHO REFUSED TO ANSWER QUESTIONS ON CROSS-EXAMINATION OR TO PRODUCE DOCUMENTARY EVIDENCE ON CROSS-EXAMINATION DOES NOT SATISFY THE "OPPORTUNITY TO CROSS-EXAMINE" RULE OF *GREENE v. McELROY*, SUPRA.

Although Appellee has not so specifically stated, it appears that he would claim that merely having the witness present, having testified on behalf of Appellee, was sufficient to satisfy the rule requiring an opportunity to cross-examination. This is simply not true. Professor Wigmore in commenting on the importance of testing of testimonial statements by cross-examination points out that the principle has always been understood as requiring, not necessarily an actual cross-examination, but merely *an opportunity to exercise the right to cross-examine*, if desired. Wigmore on Evidence (3d Ed. 1940) Vol. V, § 1371. He then discusses (§ 1372) the classes of testimonial statements which satisfy the rule requiring an opportunity for cross-examination. Amongst these classes is "the course of the examination itself, as furnishing only an incomplete opportunity." He breaks this down (§ 1390) into a number of sub-hearings, one of which is the witnesses' refusal to answer on cross-examination, or the parties' prevention of his answer. In discussing this, Wigmore says, Vol. V, § 1391 at p. 712:

> "Where the witness after his examination-in-chief on the stand, has *refused* to submit to cross-examination, the opportunity of thus proving and testing his statements, has substantially failed, and his direct testimony should be struck out.

Under these circumstances, it seems too clear to require much additional argument that Appellee should not have considered any of the testimony of the witnesses who refused to answer questions or produce documents related to their testimony. Certainly, the President by his Executive Order has specifically denied to Appellee the

authority to revoke Plaintiff's security clearances "in the absence of an effective opportunity for cross-examination of the witnesses against 'him'." In the face of Appellant's constant objections to the use of witnesses against him who refused to answer questions on cross-examination, or to produce documents relevant to their testimony, and his contention (Statement of Facts, p. 13-14, *supra*) that their testimony should have been stricken, Appellee should have voluntarily recognized the limitations imposed upon him by the Executive Order and refused to revoke the security clearance. This, Appellant contends, was a specific and definite responsibility of Appellee. As was said in *Citizens Bank and Trust Company v. Reid Motor Company*, 216 N.C. 432, 4 S.E. 2d 318, 320:

> "A party has the right to an opportunity to thoroughly and fully cross-examine a witness who has testified for the adverse party. This right, with respect to the subject to his examination-in-chief, is an absolute and not merely a privilege. A denial of it is a prejudicial and fatal error. *Resurrection Gold Mining Co. v. Fortune Mining Co.*, 8 Cir. 129 F. 668, 674 70 C.J. 611; *State v. Hightower*, 187 N.C. 300, 121 S.E. 616; *Riverview Milling Co. v. Highway Comm.*, 190 N.C. 692, 130 S.E. 724; *State v. Beall*, 199 N. C. 69, 156 S.E. 154.
>
> Where the opposing party, without fault on its part, is deprived of the opportunity of a cross-examination, it is generally held that he is entitled to have the direct testimony stricken from the record. 'This doctrine rests on the common law rule that no evidence should be admitted that was or might be under the examination of both parties and that ex parte statements are too uncertain and too unreliable to be considered in the investigation of contraverted facts.'
>
> 28 R.C.L. 600, Witnesses Sec. 189.

> While the question has not been the subject of decision in this State, courts of other States uniformly hold that where a witness refuses to answer questions on cross-examination, his testimony on direct examination should be stricken out. . . . . "

Appellee, however, says that because Appellant's Counsel did nor formally move to strike the testimony of the witnesses, that Appellant cannot now object to the testimony, although Appellant objected time and time again and in his argument before the Central Board stated that the testimony should be stricken. What Appellee is really trying to say is that Appellant waived the right to cross-examination. As we shall see, there was no such waiver.

C. IT WAS NOT NECESSARY FOR APPELLANT, IN ORDER TO PROTECT HIS RIGHTS, TO MOVE FORMALLY TO STRIKE THE TESTIMONY OF RECALCITRANT WITNESSES.

While it is true that the right to an opportunity to thoroughly and fully cross-examine a witness who has testified for an adverse party is an absolute right and not merely a privilege, and a denial of it is prejudicial and fatal error, this right can be waived. As Dean Wigmore says, (Vol. V, § 1390, p. 111):

> "Where, however, the failure to obtain cross-examination is in any sense attributable to the *cross-examiner's own consent or fault* the lack of cross-examination is, of course, no objection, according to the general principle (Ante § 1371) that an opportunity though waived, suffices."

Appellee would argue that a failure to formally move to strike testimony constitutes a waiver, whether or not the party having the right of cross-examination otherwise objects. The most that can be said is that a failure to make a motion to strike may be effective as a waiver. *Pilcher v. State*, 93 Ga. App. 605, 92 S.E. 2d 318. But

the emphasis is on what constitutes a waiver, and here the conduct of Appellant's Counsel was such as to interpose constant objections to the conduct of the witnesses as well as to the nature of the proceedings which were continued by the Examiner despite the fact that the witnesses refused to answer the questions. Appellant suggests that it was the duty of the Examiner under those circumstances to strike the testimony. This he failed to do. His conduct can only be evaluated in the light of language such as that used by Justice Windburn, in *Citizens Bank and Trust Co. v. Reid Motor Co., supra.* He said:

> "When the witness Jack Frieze refused to submit to further cross-examination after a few immaterial questions were asked, the failure of the Court to strike out the testimony given by him on examination-in-chief is error."

Only if Appellant's Counsel in this case had made no objection whatsoever to the conduct of the witnesses and to the impotence of the Examiner to require that the witness answer questions and produce documents, could it be said with any validity that Appellant's right to an opportunity for cross-examination had been waived?

Furthermore, Appellant's Counsel in effect formally moved to strike Poole's testimony during the argument of the case before the Central Board. See 643-66, R. 10, Exhibit D(6), Transcript of oral argument before the Central Industrial Personnel Access Authorization Board, December 2, 1964, pp. 3, 4, 15, and footnote 12, *supra.*

D. WITHOUT THE TESTIMONY OF THE RECALCITRANT WITNESSES THERE IS NO EVIDENCE TO SUPPORT THE DETERMINATION OF THE CENTRAL BOARD AND THE FINAL DETERMINATION OF THE APPELLEE THEREON.

The determination made by the Central Board (643-66, R. 28, Final Determination, Taglia case, Dated 14 December, 1964) was based upon the concept that either Poole and the Philco witnesses were lying or that Becker and Taglia were lying. As previously herein stated (p. 10, *supra*) the Central Board resolved the conflict in favor of Poole and the Philco witnesses, despite the fact that Appellant contended that they were lying, and despite the fact that Taglia took a lie detector test (polygraph test) and the expert witness testified that in his opinion Taglia was telling the truth. (643-66, R. 10, Exhibit A, Tr. p. 4).

Had the Central Board stricken the testimony of Poole and the Philco witnesses, as it should have, the question as to who was lying would have had to have been resolved in favor of Appellant. For this reason alone the decision of the District Court was erroneous, even though it could be argued that it had the power to grant a Motion for Summary Judgment on an issue not raised by the pleadings.

CONCLUSION

The decision of the District Court below was erroneous in the following respects: (1) Appellant was not accorded a fair hearing by Appellee with the necessary safeguards of an opportunity to exercise his right of cross-examination of witnesses testifying against him; (2) Appellant did not waive his right to an opportunity for cross-examination; (3) The decision of Appellee in the proceedings looking to revocation of Appellant's security clearance is not supported by any evidence, if the testimony of the witnesses who refused to answer questions or produce documents on cross-examination is stricken, as it should have been.

Appellant, therefore, prays that this Court reverse the decision of the Court below and remand with instructions to grant Appellant's Motion For Summary Judgment.

Respectfully submitted,

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July 28, 1960
NUMBER 5220.6

App. 1

ASD(MP&R)

[PLANTIFF'S EXHIBIT C]

Department of Defense Directive

SUBJECT Industrial Personnel Access Authorization Review Regulatio

Reference: (a) DOD Directive 5220.6, entitled "Industrial Personnel Security Review Regulation," dated February 2, 1955, as amended (cancelled)

I. GENERAL

A. Authority

This Regulation is issued pursuant to the authority vested by law, including Executive Order 10865 (reproduced as Appendix A), in the Secretary of Defense.

By an exchange of letters between the Secretary of Defense and the Administrators of the Federal Aviation Agency and the National Aeronautics and Space Administration, and as provided for in Section 1 (b), Executive Order 10865, the Department of Defense has been authorized to act for and in behalf of the Federal Aviation Agency and the National Aeronautics and Space Administration in the performance of the administrative and personnel services set forth in this Regulation. Reference (a) is hereby cancelled.

B. Purpose

1. The Secretary of Defense and the Administrators of the Federal Aviation Agency, and the National Aeronautics and Space Administration have prescribed specific requirements, restrictions, and other safeguards which they consider necessary to protect (a) releases of classified information to or within United States industry that relate to bids, negotiations, awards, or the performance or termination of contracts with their department or agency, and (b) other releases of classified information to or within industry which their department or agency has responsibility for safeguarding. In this connection, this Regulation prescribes uniform standards,

criteria, and procedures for processing to final determination all cases which come within the scope of the Industrial Personnel Access Authorization Review Program.

2. Pursuant to the agreement made between the Department of Defense, and the Federal Aviation Agency, and the National Aeronautics and Space Administration, (provided for in Section 1 (b), Executive Order 10865), this Regulation has been extended to apply to protect the releases of classified information specified in subparagraph 1., above. The Boards and instrumentalities provided for in this Regulation are hereby authorized to assume jurisdiction over, and as hereinafter provided, to process and make determinations in cases arising out of such releases of classified information.

3. This Regulation is issued to conform the Industrial Personnel Access Authorization Review Program to the requirements of Executive Order 10865.

C. Definitions

1. Whenever the words "Department of Defense", or "Department of Defense agency or activity", or "military department" are used herein, they shall be deemed to include where applicable the Federal Aviation Agency, or the National Aeronautics and Space Administration.

2. Access Authorization: An authorization to have access to one or more categories of information classified in accordance with Executive Order 10501. (NOTE: Actual access, when authorized, requires both an access authorization and a "need to know".) In the case of a contractor, an "access authorization" is an authorization for the contractor involved to have access to specific categories of classified information provided such access is (a) required in connection with the bidding, negotiation, award, performance, or termination of contracts with a Department of Defense agency or activity or (b) required in connection with other releases of classified information to or within industry. In the case of a contractor employee, an "access authorization" is an authorization for the employee to have access to specific categories of classified information provided such access is (1) required for the performance of his work with a particular contractor on contracts with a Department of Defense agency or activity or (2) required in connection with the release of classified information to or within industry.

3. Administrator: The Administrator of the Federal Aviation Agency, or the National Aeronautics and Space Administration.

4. Agency case: A case arising out of the release of classified information to or within industry directly by the Federal Aviation Agency or the National Aeronautics and Space Administration in connection with the bidding, negotiation, award, or performance or termination of a contract by one of those agencies.

5. Applicant: Any person who is eligible to have the matter of granting, revoking, or denying him an access authorization determined or reconsidered under the Industrial Personnel Access Authorization Review Program as provided for in paragraphs I.F. and V.B.

6. Contractor: An industrial, educational, commercial, or other entity which has executed a contract or a Department of Defense Security Agreement (DD Form 441) with a Department of Defense agency or activity.

7. Personal appearance proceeding: A proceeding before the New York, Washington, or Los Angeles Industrial Personnel Access Authorization Field Board convened and conducted in accordance with this Regulation. The use of the terms "personal appearance proceeding" or "proceeding" in this Regulation does not imply, and shall not be construed to mean, that such procedures are subject to the provisions of the Administrative Procedure Act, or that the rules of evidence customary in the courts of the United States shall be applied.

D. Policy

1. The responsibilities of the Department of Defense, including those imposed by the President in Executive Order 10865, necessitate application of policies designed to minimize the possibility of compromise incident to placing classified information in the hands of industry. Adequate measures will be taken to insure that no person is granted, or is allowed to retain, an authorization for access to classified information unless the available information justifies a finding that such access authorization, at the specific classification category granted, is clearly consistent with the national interest.

2. A determination that granting or retaining authorization for access to information of a specific classification category is not clearly consistent with the national interest shall result in denying or revoking authorization for such access. Any determination under this Regulation adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the

loyalty of the applicant concerned. A determination under this Regulation favorable to an applicant is not, in and of itself, an access authorization; nor is it in any sense a determination that the applicant concerned actually requires access to classified information. Since an access authorization relates only to access to classified information, denying or revoking such an authorization does not preclude participation in unclassified work.

3. In the absence of the power to subpoena witnesses, the Secretary of Defense, through the Director, Office of Industrial Personnel Access Authorization Review, may issue in appropriate cases invitations and requests to appear and testify, and may defray reasonable and necessary expenses incurred by such witnesses, in order that the applicant may have the opportunity for cross-examination provided by this Regulation. So far as the national security permits, investigative agencies under the control of the Department of Defense shall cooperate by identifying to the Office of Industrial Personnel Access Authorization Review, persons who have made statements adverse to the applicant and by assisting in making such persons available for cross-examination.

4. All personnel involved in the processing of cases under the Industrial Personnel Access Authorization Review Program shall comply with the applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, shall be disclosed to any applicant, or to his counsel or representatives, or to any other person not authorized to have access to such information. In cases involving individual applicants, the employer concerned may be advised only of the final determination in the case and of any interim decision to suspend an access authorization previously granted. Except at the written request of the applicant, the Department of Defense shall not release copies of the Statement of Reasons or findings relative thereto outside of the Executive Branch of the Government.

E. Program

The Industrial Personnel Access Authorization Review Program is hereby revised, modified, and continued in accordance with this Regulation. The Program shall be administered by the Director, Office of Industrial Personnel Access Authorization Review, who shall have a staff for that purpose. The Office

of Industrial Personnel Access Authorization Review shall consist of the following elements:

1. The Office of the Director.

2. The Industrial Personnel Access Authorization Screening Board (hereinafter called the Screening Board).

3. The Industrial Personnel Access Authorization Field Boards (hereinafter called the Field Boards).

4. The Central Industrial Personnel Access Authorization Board (hereinafter called the Central Board).

F. Scope of Program

1. Except as provided in subparagraph d. of this paragraph the procedures established in this Regulation shall be applicable to cases in which the applicant is eligible under the Armed Forces Industrial Security Regulation for consideration as to the granting or continuing of an access authorization and in addition thereto:

   a. A Department of Defense agency or activity has recommended that an access authorization of a contractor or contractor employee be denied or revoked;

   b. A Department of Defense agency or activity has suspended an access authorization of a contractor or contractor employee;

   c. A Department of Defense agency or activity has denied or withdrawn a temporary access authorization from an individual, other than a foreign national, who falls within such categories as may be established under this subparagraph; or

   d. Action is requested by the Secretary of Defense, or the Secretary of any military department or the Administrator concerned.

2. Once access authorization has been suspended, or a Statement of Reasons has been issued, or a temporary authorization for access has been withdrawn or denied in the case of applicants included in categories established under subparagraph 1., above, these procedures may be invoked by an applicant even though his employment has been terminated.

II. ORGANIZATION

A. Office of Industrial Personnel Access Authorization Review

1. Organization

a. The Office of Industrial Personnel Access Authorization Review shall be established in the Office of the Secretary of Defense and will function under the administrative jurisdiction of the Assistant Secretary of Defense (MP&R). The Office shall be headed by a civilian Director appointed by the Secretary of Defense after consultation with the Assistant Secretary of Defense (MP&R) and the Secretaries of the Army, Navy and Air Force. Policy guidance for the operation of the program including manpower and personnel requirements shall be provided by the Assistant Secretary of Defense (MP&R). The Director shall be responsible for administering the Industrial Personnel Access Authorization Review Program, including its constituent boards; he shall advise and consult with the Secretaries of the Army, Navy and Air Force in carrying out this responsibility. He shall be responsible for ensuring that the Screening, Field and Central Boards are provided with such advice, assistance and personnel, including legal and security advice, as he considers necessary to enable these elements properly to carry out their functions under this Program. He shall have such professional, technical, and clerical staff as he may require to carry out his responsibilities, as set out herein, and such other related responsibilities as may be prescribed. The Director is authorized to obtain information, assistance, and advice directly from any agency or activity of the Department of Defense, and, in accordance with established policies, from other agencies of the Government. He shall prepare monthly reports showing caseloads and the status of pending cases. The Director may issue such supplemental instructions, not inconsistent with this Regulation, as may be desirable for the administration and efficient operation of this Program, including rules for the processing of cases, the conduct of screenings, personal appearance proceedings, determinations and reviews, and for guidance in the application of the standard and criteria set forth in paragraph III. In any particular case, the Director may request additional investigation to be made subject to the provisions of any agreements with investigative agencies outside the Department of Defense.

b. The Office of Industrial Personnel Access Authorization Review shall be located in the Pentagon and shall be

supported administratively by the Office of the Secretary of Defense. The military departments shall make appropriate allocations of funds, military and civilian personnel, and personnel spaces.

c. Communications shall be addressed to the Director, Office of Industrial Personnel Access Authorization Review, The Pentagon, Washington 25, D. C.

2. Department Counsel

The Office of Industrial Personnel Access Authorization Review shall include within its staff a sufficient number of qualified attorneys, who may be stationed in Washington, D. C. or at such other locations as the Director may select, to act as counsel for the Department of Defense in each case in which a personal appearance proceeding is held under this Regulation. When designated by the Director to serve in this capacity, department counsel shall perform the functions normally and customarily associated with said position. Department counsel shall also advise and assist the Screening Board as required, and shall represent the Department of Defense before the Central Board when appropriate.

3. Files

The complete files of all review cases pertaining to industrial personnel shall be maintained by the Department of the Army.

B. Industrial Personnel Access Authorization Screening Board

1. The Screening Board shall be located in the Office of Industrial Personnel Access Authorization Review and shall be responsible for the performance of the duties and functions hereinafter prescribed.

2. The Secretary of each military department shall appoint one or more members, military or civilian, to the Screening Board as the caseload requires. Appropriate officials designated by each Secretary will submit nominations through the Director, who will review the qualifications of each nominee and make an appropriate recommendation to the Secretary concerned. Except as provided in paragraph II.F., any three members so appointed, one from each military department, shall constitute a quorum-panel so that more than one panel may be convened at the same time. The Director shall designate one member to serve as Chairman of the Screening Board.

3. The Screening Board shall have jurisdiction over all cases which are referred to it in accordance with this Regulation.

C. Industrial Personnel Access Authorization Field Boards

1. There shall be three field boards, which shall be known as the New York, the Washington and the Los Angeles Industrial Personnel Access Authorization Field Boards and which shall be located in said cities. Additional field boards may be established by the Director with the approval of the Secretaries of the Army, Navy and Air Force. Panels of existing Field Boards may be convened at other locations to provide prompt and convenient personal appearance proceedings. Each Field Board shall be responsible for the performance of the duties and functions hereinafter prescribed.

2. The Secretary of each military department shall appoint one or more members, military or civilian, to each Field Board as the caseload requires. Appropriate officials designated by each Secretary will submit nominations through the Director, who will review the qualifications of each nominee and make an appropriate recommendation to the Secretary concerned. The Director shall designate either one member of the Board or a staff member to serve as administrative director of each Board who will be responsible for the immediate operations of the Board. A quorum-panel may consist of any one civilian member who is a qualified attorney, or of any three members, one from each military department, of whom at least one shall be a civilian and at least one shall be a qualified attorney. When a panel of three members is convened, the administrative director shall designate one member to act as Chairman. A quorum-panel may exercise all of the authority conferred on the Board or Chairman by this Regulation.

3. Each Field Board will have jurisdiction over all cases referred to it in accordance with this Regulation.

D. Responsibilities of Military Departments for Administrative Support

1. Except as provided in paragraph 2., the Field Boards shall be supported administratively by the following military departments, which shall appoint such other personnel as may be required by the Director to assist each Field Board:

New York Industrial Personnel Access Authorization Field Board
Department of the Army

Washington Industrial Personnel Access Authorization Field Board
Department of the Air Force

Los Angeles Industrial Personnel Access Authorization Field Board
Department of the Navy

2. Whenever, pursuant to direction of the Director, a panel of a Field Board established under paragraph II.C.1., above, is convened at any of the following named locations, the commanders named, respectively, shall arrange or provide for the administrative support needed by such board panel in order to discharge its official business at such locations:

Alaska:
Commander, Alaskan Air Command

Virgin Islands, Canal Zone, and Puerto Rico:
Commanding General, USA, Carribean

Guam, American Samoa, Wake, Midway, Guano Island & Hawaii:
Commandant, 14th Naval District

3. Where a panel of a Field Board is convened at a location other than its principal office or at a location outside the jurisdiction of the commanders named in paragraph 2., above, the military department requested by the Director shall provide office space, facilities and clerical personnel for each personal appearance proceeding and for the prompt making of a verbatim transcript thereof.

4. As a verbatim transcript will be required of each personal appearance proceeding before a Field Board, it is the responsibility of each of the above mentioned commanders to provide the necessary personnel and facilities for the prompt making of such transcripts.

E. Central Industrial Personnel Access Authorization Board

1. There is hereby established a Central Board, which shall be located in the Office of Industrial Personnel Access Authorization Review, and shall be responsible for the performance of the duties and functions hereinafter prescribed.

2. The Secretary of each military department shall appoint one or more members, military or civilian, to the Central Board as the caseload requires. Appropriate officials designated by each Secretary will submit nominations through the Director, who will review the qualifications of each nominee and make an appropriate recommendation to the Secretary concerned. The Director shall designate one member to serve as Chairman of the Central Board. Except as provided in paragraph II.F., any three members so appointed, one from each military department, shall constitute a quorum-panel so that more than one panel may be convened at the same time. One of the members of each quorum-panel must be a qualified lawyer and each quorum-panel shall include at least one civilian.

3. The Central Board shall have jurisdiction over all cases referred to it in accordance with this Regulation.

F. Composition of Boards in Agency Cases

1. Whenever an agency case is referred for consideration and determination under the Program the Administrators concerned shall be entitled to appoint one member to the Screening Board and two members to the Central Board. Such appointments shall conform to the requirements of paragraph II.G. of this Regulation.

2. Whenever an agency case is referred to the Screening or Central Boards, the Director shall notify the Administrator concerned thereof. The Administrator, or his designee, shall, in their absolute discretion, exercise or waive the right of his agency to be represented on the Board involved and shall notify the Director thereof in writing, which notification shall be made a permanent part of the record in the case. If the right is exercised, the Screening Board panel to which the case is referred shall consist of four members and the Central Board panel of five members, instead of the usual three members; if it is waived the Board shall be constituted as provided in paragraphs II.E. or II.E., above.

G. Access Authorization of Nominees

No person shall be appointed Director, board member, or staff member under this Program until such person has been granted an authorization for access to Top Secret information, or its equivalent, based on a background investigation.

II. STANDARD AND CRITERIA

A. Standard for Issuing an Access Authorization

Authorization for access to classified information of a specific classification category shall be granted or continued only if it is determined that such access by the applicant is clearly consistent with the national interest.

B. Criteria for Application of Standard in Cases Involving Individuals

1. Commission of any act of sabotage, espionage, treason, or sedition or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason or sedition.

2. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, revolutionist, or with an espionage agent or other secret representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.

3. Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of Government of the United States by unconstitutional means.

4. Membership in, or affiliation or sympathetic association with, or participation in the activities of any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist, or subversive, or which has adopted or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means.

5. Intentional, unauthorized disclosure to any person of classified information, or of other information, disclosure of which is prohibited by law.

6. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

7. Participation in the activities of an organization established as a front for an organization referred to in subparagraph 4., above, under circumstances indicating that his personal views were sympathetic to the subversive purposes of such organization.

8. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.

9. Sympathetic interest in totalitarian, fascist, communist, or similar subversive movements.

10. Sympathetic association with a member, or members, of an organization referred to in subparagraph 4., above.

(Ordinarily, this will not include chance or occasional meetings, nor contacts limited to normal business or official relations.)

11. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in subparagraphs 1. through 9., above. A close continuing association may be deemed to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with such person.

12. Close continuing association of the type described in subparagraph 11., above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

13. Willful violation or disregard of security regulations.

14. Any behavior, activities, or associations which tend to show that the individual is not relieble or trustworthy.

15. Any deliberate misrepresentations, falsifications or omission of material facts from a Personnel Security Questionnaire, Personal History Statement, or similar document.

16. Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

17. Acts of a reckless, irresponsible or wanton nature which indicate such poor judgment and instability as to suggest that the individual might disclose classified information to unauthorized persons, or otherwise assist such persons, whether deliberately or inadvertently, in activities inimical to the national interest.

18. Any illness, including any mental condition, of a nature which, in the opinion of competent medical authority, may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

19. Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may be likely to cause action contrary to the national interest.

20. The presence of a spouse, parent, brother, sister, or offspring in a nation whose interests may be inimical to the interests of the United States, or in satellites or occupied areas of

such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such relatives which may be likely to cause action contrary to the national interest.

21. Refusal by the individual, without satisfactory subsequent explanation, to answer questions before a Congressional or legislative committee, or Federal or State court or other tribunal, regarding charges of his alleged disloyalty or other misconduct.

C. Guidance for the Application of the Standard and Criteria

1. The activities and associations listed in paragraph III.B., above, describe conduct which may, in the light of all the surrounding circumstances, be the basis for denying or revoking an access authorization. The conduct varies in implication, degree of seriousness and significance depending upon all the factors in a particular case. Therefore, the ultimate determination of whether an authorization should be granted or continued must be an over-all common-sense one on the basis of all the information which may properly be considered under this Regulation including but not restricted to such factors, when appropriate, as the following: the seriousness of the conduct, its implications, its recency, the motivations for it, the extent to which it was voluntary and undertaken with knowledge of the circumstances involved and, to the extent that it can be estimated and is appropriate in a particular case, the probability that it will continue in the future.

2. Legitimate labor activities shall not be considered in determining whether access authorization should be granted or continued.

3. It is essential to the efficient, economical, and equitable operation not only of the Industrial Personnel Access Authorization Review Program, but of the total procedures whereby the Department of Defense authorizes access to classified information, that applicants provide full, frank and truthful answers when they complete official questionnaires or other similar documents, or respond to official inquiries. Accordingly, the deliberate giving of false or misleading testimony or information on relevant matters, may be sufficient standing alone to justify denying or revoking access authorization and shall be weighed carefully before a determination is reached under this Program.

4. The granting or continuing of an authorization for access to a contractor is not clearly consistent with the national interest if the access authorization of an owner, officer,

director, or any executive of the contractor who is required to have such an access authorization, has not been, or would not be, granted under the standard and criteria set forth in paragraphs III.A. and III.B., above.

V. PROCESSING OF CASES

A. Emergency Action

Department of Defense activities or agencies may not make a final determination denying or revoking an authorization for access. In exceptional cases officials authorized by the military department concerned may suspend an authorization previously granted to an individual (but not to a facility) when, in the opinion of the authorized official, the individual's continued access to classified information, pending action by the Screening Board, would constitute an immediate threat to the national interest. Any such suspension action shall be reviewed by the Screening Board to determine its propriety.

B. Forwarding Cases

Department of Defense activities or agencies shall forward to the Director all cases prescribed in paragraph I.F.1 together with the complete file, including the recommendation in the case, the reasons therefor, and all other available information and material relevant to a determination. After ensuring that the file has been properly prepared and transmitted, the Director shall forward it to the Screening Board for appropriate action.

C. Initial Adjudication Procedures (Screening Board Action)

1. The Screening Board shall review each case referred to it by the Director and shall determine in accordance with the standard and criteria set forth in paragraph III whether the reported information warrants (a) authorizing or continuing to authorize access at the specific classification category requested or (b) further processing as set forth below.

2. With respect to any case pending before it, the Screening Board may request the Director to:

   a. Request further investigation, specifying the particular points on which the Board feels its information is not adequate.

   b. Issue to the applicant such written interrogatories as the Board may deem desirable.

   c. Arrange for an interview with the applicant.

d. Arrange for an interview with any witness who has given information relevant to a decision in the case.

3. The Screening Board may, with respect to any case pending before it, determine at any time that an existing authorization shall be suspended. Upon any such determination, the Director shall notify the applicant, the contractor, the office of the cognizant military department and the agency or activity which forwarded the case to him.

4. If the Screening Board determines that access at the specific classification category requested should be granted or continued in effect, it shall prepare its determination in accordance with the instructions set out in subparagraph 9., below. The Director shall notify the agency or activity which forwarded the case to him of the determination and instruct it to effect the authorization where appropriate. The Screening Board shall reconsider its determination at the request of the Secretary of Defense, the Secretary of a military department, or the Administrator concerned.

5. If the Screening Board concludes on the basis of the information available to it and in accordance with the standard and criteria set forth in paragraph III that the case does not warrant a determination favorable to the applicant, it shall prepare a Statement of Reasons informing the applicant of the grounds upon which his access authorization may be denied or revoked. This Statement of Reasons shall be as comprehensive and detailed as the national security permits. At the time a Statement of Reasons is issued, any access authorization previously granted for Secret or Top Secret shall be suspended or limited to Confidential unless such access authorization was granted pursuant to board action under any industrial personnel review program in which case the Screening Board shall determine whether the access authorization should be suspended or limited. The Screening Board shall also determine whether any access authorization previously granted for Confidential should be suspended or limited.

6. The Director shall forward the Statement of Reasons and a copy of this Regulation to the applicant and shall inform him of the status of his access authorization pending a final determination. An applicant who has been served with a Statement of Reasons and who has filed under oath or affirmation a written reply thereto which complies with the requirements of paragraph IV.C.7 shall be afforded:

a. An opportunity to appear personally before a Field Board for the purpose of supporting his eligibility for access authorization and of presenting evidence on his own behalf.

b. A reasonable time to prepare for that appearance.

c. An opportunity to be represented by counsel without cost to the Government.

d. The opportunity to cross-examine adverse witnesses prescribed in paragraph IV.E.2.

7. Before an applicant is afforded an opportunity to make a personal appearance before a Field Board he must submit a detailed written answer under oath or affirmation specifically admitting, denying or disclaiming knowledge of each allegation and each supporting fact alleged in the Statement of Reasons. The applicant's answer must either admit or deny each allegation or supporting fact, giving such explanation as may be available to him, or disclaim knowledge thereof. A general denial or other similar answer is not sufficient. The applicant must set out his position with sufficient particularity to disclose the basis thereof, in order that the Department of Defense may determine in advance of the personal appearance proceeding whether the allegations and supporting facts are wholly denied, denied in part, or wholly admitted and make arrangements to produce such information in support as may be required. The Director may decline to accept answers which do not meet the above requirements and, upon notice to the applicant, may refuse to continue to process his application. In that event, the Director shall suspend any access authorization then in effect and give appropriate notice. In the alternative, the Director may forward the case to a Field Board which may treat allegations or supporting facts with respect to which the Director finds the answer is insufficient as established for the purpose of making a determination under this Program.

8. Where the applicant:

a. Files an answer which complies with subparagraph 7. and requests a personal appearance procedding, or where, although the answer is insufficient, the Director elects to proceed as provided for in said subparagraph, the Director shall assign the case to a Field Board for a proceeding.

b. Files an answer which complies with subparagraph 7., but elects not to request a personal appearance proceeding, the Director shall assign the case to the Central Board for determination on the basis of all available information including the answer and all documents in support thereof.

c. Does not answer, the Director shall instruct the department which forwarded the case to deny or revoke access authorization, as appropriate, and shall advise the applicant.

9. All determinations by the Screening Board shall be made in executive session. A determination to grant or continue access authorization shall be by unanimous vote. No person other than members of the Board shall be present when the Board deliberates and reaches its determination.

10. Decisions adverse to the applicant announced by the Director in accordance with paragraph IV.C.8.c. may be reconsidered by the Screening Board at the request of the Director, or at the request of the applicant addressed through the Director, after a finding by the Screening Board that there is newly discovered evidence or that other good cause has been shown.

D. Personal Appearance

1. Promptly after being notified by the Director that a case has been referred for a personal appearance proceeding, the Chairman of the Field Board shall set a time and place for the proceeding and inform the applicant thereof. Personal appearance proceedings shall be held as soon as practicable, allowing the applicant and the Department of Defense a reasonable time to prepare. Postponements may be granted by the Chairman in his sound discretion upon application by either party with notice to the other.

2. Normally, a personal appearance proceeding shall be held at the home office of the Field Board concerned. When the applicant so requests and when in the discretion of the Chairman equity to him requires that the proceeding be held in a different place, or when the interests of the Government would be served thereby, Field Boards, subject to the over-all authority of the Director, may arrange to convene at such times and places as will best meet the above objectives.

3. It is to the advantage of both the applicant and the Department to shorten and simplify the proceedings before the Field Board by stating the issues and arriving at an agreed-upon version of the facts in the case when it is possible to do so. Department counsel is authorized to consult directly with the applicant, or if he has counsel or representative, with them, for purposes of reaching mutual agreement upon arrangements for an expeditious proceeding in the case. Such arrangements may include clarification of issues, and stipulations with respect to testimony and the contents of documents and other

physical evidence. Such stipulations when entered into shall be binding upon the applicant and the Department of Defense for the purpose of these proceedings.

4. The applicant is responsible for producing witnesses in his own behalf or presenting other evidence before the Field Board to support his reply to the Statement of Reasons. When specific assistance is requested, however, the department counsel and the Chairman of the Field Board may provide such assistance, upon a showing that it is practicable and necessary. In the Chairman's sound discretion, invitations to attend the proceeding as witnesses in the applicant's behalf, or requests for specific documents or other physical evidence, may be tendered upon application, provided a showing of the necessity for such assistance has been made.

5. Department counsel is responsible for producing at the proceeding witnesses and information relied upon by the Department to establish those facts alleged in the Statement of Reasons which have been controverted. Every reasonable and practicable effort shall be made to obtain witnesses and to facilitate their appearance in accordance with the policy set out in paragraph I.D.3. When requested all Department of Defense agencies and activities shall cooperate in carrying out this policy.

6. Where an applicant who has requested an opportunity to appear fails without sufficient reason therefore to appear at the time and place set for the proceeding, or at any postponement thereof, and has not requested that his case be determined on the basis of all available information including any written material he may have submitted, the Field Board shall return the case to the Director without further action. The Director shall then take action under paragraph IV.C.8.c.

E. Procedures for Personal Appearance Proceedings

1. General Provisions

a. Personal appearance proceedings are designed to ascertain all the relevant facts in a case to aid in reaching fair and impartial determinations. Such proceedings are not to be conducted with the formality of a court proceeding or of an administrative hearing conducted under the Administrative Procedure Act, but rather as administrative inquiries held for the purpose of affording the person concerned an opportunity to appear for the purpose of supporting his eligibility for an access authorization and to permit the Department of Defense to inquire fully into the matters related to the particular case. As

provided in paragraph IV.E.2.a., the customary rules of evidence shall not be controlling.

b. Personal appearance proceedings conducted under this Regulation are not adversary in nature. Nevertheless, a careful and searching inquiry into the facts is necessary if the objectives of this Regulation are to be effectuated. Field Boards shall be alert to the necessity for identifying and resolving disputed issues of fact whenever possible and shall make their rulings with these considerations in mind.

c. Personal appearance proceedings shall be conducted in an orderly manner and in an atmosphere of dignity and decorum. They may be attended only by the members of the Field Board, the applicant and his counsel or representatives, authorized personnel of the Department of Defense and necessary clerical personnel. Unless the Chairman of the Field Board rules otherwise, a witness may be present only when he is testifying.

d. The Director shall designate a qualified attorney to represent the Department of Defense and to act as department counsel in each case. He shall represent the Department, and shall be responsible for making a complete record and for placing before the Field Board all material which may properly be incorporated therein. He shall question Department of Defense witnesses and cross-examine witnesses produced by the applicant, although the Field Board may also question any witness.

e. After the proceeding has been convened, and the Statement of Reasons and the applicant's answer thereto have been entered into the record, normally the applicant shall have the right to make a general opening statement either in person or by counsel, and to present his case. He may call witnesses, testify in his own behalf if he so desires and present documents, or other information, in support of his application for access authorization, and cross-examine witnesses produced by the Department of Defense.

f. Witnesses before the Field Board shall testify subject to the provisions of Sec. 1001, Title 18, U.S. Code. Before testifying they shall be informed that said section makes it a criminal offense punishable by a maximum of five years imprisonment, $10,000 fine, or both, knowingly and willfully to make a false statement

or representation to any department or agency of the United States as to any matter within the jurisdiction of any department or agency of the United States. Written interrogatories must be sworn to before a notary public or other official authorized to administer oaths.

g. When appropriate the Field Board shall amend the Statement of Reasons to conform it with the information available and enter the amendment into the record. When such amendments are made, the Chairman of the Field Board shall grant the applicant such additional time as, in his sound discretion, he deems appropriate to answer such amendments and to secure and present evidence pertaining thereto.

h. The Field Board may recess the proceeding at any time at the request of the applicant or his counsel, department counsel, or upon its own motion.

i. Before the Chairman of the Field Board adjourns the proceeding, he shall ask the applicant whether he desires additional time to secure and present additional evidence or to submit a brief. If the applicant desires to present such additional material, the Field Board shall determine the time within which it must be presented and the form in which it will be received. The Chairman shall also advise the applicant that announcement of the determination in his case will be made by the Director, Office of Industrial Personnel Access Authorization Review.

j. A verbatim transcript (in triplicate) shall be made of the proceedings and such transcript shall become a permanent part of the record. The transcript shall not include information introduced in accordance with the provisions of paragraph IV.E.2.e. and f., below. The applicant or his designated representative shall be furnished without cost one copy of the transcript, less the exhibits, upon his request. The transcript shall be reviewed by the Board prior to release to ensure that it contains no classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants.

k. If the applicant or his counsel desires to submit corrections in the transcript to the Field Board, he shall note the corrections on a separate statement designating the page and line. The statement of corrections must be filed within the time set by the Field Board which shall determine what corrections are allowable, shall enter on the transcript by marginal notation the corrections which are allowed, and shall

enter on the statement filed by the applicant the corrections which are rejected. This statement shall be made a permanent part of the record. The Chairman of the Field Board in his discretion may call upon the applicant or his counsel for a discussion of the corrections. Corrections shall be allowed solely for the purpose of conforming the transcript to the actual testimony.

1. Whenever the Field Board concludes with respect to an issue of fact that the investigation is inadequate or that all of the information has not been fully developed or explored, it may request that further investigation be conducted and in appropriate cases may recess the proceeding pending such investigation. Such requests shall be addressed to the Director through the department counsel. Information developed through supplemental investigation shall be made available to the Board in the same manner as information developed in the original investigation.

2. Introduction of Information

a. The record shall consist exclusively of all information presented by the Department of Defense in accordance with this Regulation, together with all information submitted by the applicant. The record shall not be limited to evidence admissible in the courts of the United States. Any oral or documentary evidence may be received if otherwise admissible under this Regulation and accorded the weight deemed appropriate, but irrelevant, immaterial or unduly repetitious material may be excluded, in the sound discretion of the Chairman of the Field Board. Efforts shall be made to obtain the best evidence available.

b. Unless permitted by paragraphs e. and f., below, the record may contain no information adverse to the applicant on any controverted issue unless (1) the information or its substance has been made available to the applicant and he offers no objection to its presentation; or (2) the information or its substance is made available to him and the applicant is afforded an opportunity to cross-examine the person providing the information either orally or by written interrogatories. The foregoing shall not apply to information bearing upon the characterization in the Statement of Reasons of any organization or individual other than the applicant. Information the admission of which is not prohibited by this paragraph, or by any other provision of this Regulation, may be received and made part of the record and may be considered by any board or official charged with making determinations under this Regulation.

c. Prior to the referral of a case to a Field Board for a personal appearance proceeding, the Director, Office of Industrial Personnel Access Authorization Review, upon application by either the applicant or the department counsel, shall rule whether, in the light of all the circumstances, testimony shall be taken personally, by deposition, or through cross-interrogatories. In making this ruling, the Director shall exercise his sound discretion and shall state his reasons therefor. He may direct the applicant or his counsel, and department counsel to frame written interrogatories and upon application by either party shall rule upon the relevancy and materiality of any question to be incorporated therein. Once the case has been referred to the Field Board, the Chairman of the Field Board shall perform this function. Any action taken by the Director under this paragraph shall be reflected in the record where appropriate.

d. Notwithstanding any other provision of this Regulation, records compiled in the regular course of business, or other physical evidence other than investigative reports as such, may be received and considered subject to rebuttal without authenticating witnesses, provided such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense or the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration to safeguard classified information within industry pursuant to Executive Order 10865. Such documents shall be exhibited to the applicant and when received by the Field Board shall be made a part of the record in the case.

e. Records compiled in the regular course of business, or other physical evidence other than investigative reports as such, relating to a controverted issue, which, because they are classified, may not be inspected by the applicant, may be received and considered provided that (1) the Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that purpose pursuant to Section 5,(b), Executive Order 10865, has made a preliminary determination that said physical evidence appears to be material, and that failure to receive and consider it would, in view of the level of access sought, be substantially harmful to

the national security, and (2) to the extent that the national security permits, a summary or description of said physical evidence shall be made available to the applicant. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered.

f. A written or oral statement by a person adverse to the applicant on a controverted issue, and not relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant, may be received and considered without affording an opportunity to cross-examine the person making the statement only in circumstances described in either of the following subparagraphs, provided however, that a summary of the statement as comprehensive and detailed as the national security permits shall be made available to the applicant:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that particular purpose pursuant to Section 4 (a),(2), of Executive Order 10865, has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (a) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (b) due to some other cause

determined by the Secretary or the Deputy Secretary of Defense, or when appropriate, by the Administrator or Deputy Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration to be good and sufficient.

g. A written or oral statement of a person relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant may be received and considered without affording the applicant an opportunity to cross-examine the person making the statement, irrespective of whether the statement is adverse to the applicant or relates to a controverted issue, provided the applicant is given notice that it has been received and may be considered by the Board, and is informed of its contents to the extent permitted by paragraph I.D.4., above.

h. Whenever information is made a part of the record under the exceptions authorized by subparagraphs e. or f. (1) or (2), the record shall contain certificates evidencing that the determinations required therein have been made. Such certificates shall include the reasons therefor and shall be made available to the applicant unless their disclosure is prohibited by paragraph I.D.4., above.

i. In any case where information is received by the Field Board pursuant to subparagraphs e. or f. (1) or (2), a final determination adverse to the applicant in a Department of Defense case shall be made only by the Secretary of Defense, and in an agency case by the Administrator of the Federal Aviation Agency or of the National Aeronautics and Space Administration, as appropriate, based upon their personal review of the case.

F. Field Board's Report

1. As promptly as possible after the proceeding and after full consideration of the record and of any arguments made or briefs submitted, the Field Board shall prepare a report which shall include a recommended decision in the case, prepared in accordance with the standard and criteria set forth in paragraph III. The Field Board's report shall contain a recitation of the questions presented, a summary of the evidence received, findings of fact with respect to each allegation made, and its conclusion on each question presented for consideration. The Field Board's report shall be forwarded through the Director to the Central Industrial Personnel Access Authorization Board. The report shall not be made available to the applicant.

2. Whenever an applicant has made a personal appearance before a Field Board, a decision adverse to him may be made only on grounds stated in the Statement of Reasons and any amendments thereto and must be based upon a record that is in conformity with Executive Order 10865 and this Regulation. A Field Board or the Central Board may not receive or consider any information with respect to any fact in issue, unless such information is made available to such Board in accordance with this Regulation.

3. In every case where applicable, the Field Board shall give appropriate consideration to the fact that the applicant did not have the opportunity to inspect classified information or to identify or cross-examine persons constituting sources of information. It shall also give appropriate consideration to whether information was given under oath or affirmation, and whether or not the person concerned has had an opportunity to rebut it. In every case where classified physical evidence is involved, information as to the authenticity and accuracy of said physical evidence furnished by the investigative agency shall be considered.

G. Action by the Central Industrial Personnel Access Authorization Board

1. Whenever a case is referred to the Central Board, it shall make a final determination subject to the provisions of paragraph IV.I.3. in cases which do not fall within the provisions of paragraphs IV.E.2.e. or IV.E.2.f. (1) or (2), specifying the specific category of classified information to which access shall be granted or continued where appropriate.

2. In cases where the provisions of paragraphs IV.E.2.e. or IV.E.2.f. (1) or (2) apply, the Central Board shall (a) prepare a final determination where the decision is to grant or continue access at the specific classification category requested, or (b) where it concludes that access at that specific classification category is not warranted, it shall so notify the Director.

3. Before the Central Board makes a final decision, it shall take the following action, as applicable:

   a. If the Board reaches a tentative decision adverse to the applicant, it shall, through the Director, give

notice thereof to the applicant together with notice of its proposed findings for or against him with respect to each allegation in the Statement of Reasons, and shall provide him with an opportunity to make an appearance before it, in person or by counsel, or to file a written brief. Within ten (10) calendar days after his receipt of such notice, the applicant may file with the Board a written notice of intention to appear or to file a written brief. If the applicant files such written notice of intention, the Board shall fix as early a date as practicable for filing a written brief or making a personal appearance before it, and, through the Director, shall give notice thereof to both the applicant and department counsel and at the same time shall furnish department counsel with copies of the tentative decision and proposed findings as previously furnished to the applicant.

b. If the Board reaches a tentative decision favorable to the applicant it shall, through the Director, give notice thereof to the department counsel together with notice of its proposed findings for or against the applicant with respect to each allegation in the Statement of Reasons, and shall provide department counsel with an opportunity to make an appearance before it, or to file a written brief. Within ten (10) calendar days after receipt of this notice, department counsel may file with the Board a written notice of intention to appear or to file a written brief. If department counsel files such written notice of intention, the Board shall fix as early a date as practicable for filing written brief or making personal appearance before it, and, through the Director, shall give notice thereof to both department counsel and the applicant and at the same time shall furnish the applicant with copies of the tentative decision and proposed findings as previously furnished to department counsel.

c. Personal appearances before the Central Board and written briefs filed with the Central Board are intended to permit the applicant and department counsel to present their positions based exclusively upon the record made before the Field Board, and shall not be used as a substitute for proceedings before such a Board. Argument may be made, but witnesses shall not be heard and testimony shall not be taken.

d. Under a. and b., above, when the applicant or department counsel, as the case may be, has filed a written notice

of intention, the other shall be entitled at the designated time to appear personally or file a written brief as he may prefer. Failure by him to utilize this opportunity shall be deemed a waiver thereof.

e. After the applicant and department counsel have submitted written briefs or appeared before the Central Board, as provided in subparagraphs a. and b., above, the Board shall reach a final determination in all cases in which it is authorized to do so, and shall refer all other cases to the Director for action by him in accordance with paragraph H., below. If the applicant under subparagraph a., above, or department counsel under subparagraph b., above, fails to file written notice of intention, or fails, after filing such notice, to appear or file a written brief in a timely manner, the tentative decision of the Board shall automatically become final in all cases in which the Board is authorized to make a final determination and notice thereof shall be given in accordance with paragraph I., below; in all other cases the tentative decision shall be referred to the Director for action by him in accordance with paragraph H., below.

4. In reaching a determination or conclusion as hereinabove provided, the Central Board may adopt, modify or reverse the findings, conclusion, or recommendation of the Field Board, or may request further investigation or may return the case through the Director to the Field Board with instructions to take further testimony or conduct other proceedings. In each case it shall consider the matters set out in paragraph IV.F.3., above.

5. In cases in which it is authorized to reach a final determination, the Central Board shall prepare an opinion which shall include an analysis of the evidence, findings of fact and the reasoning on which the determination is based. The determination shall be reached by majority vote, shall be signed by the members, and made a permanent part of the record in the case. If a determination is not unanimous, a minority opinion shall be filed.

H. Action by the Secretary of Defense or the Administrators

Whenever a case falls within the provisions of paragraphs IV.E.2.e. or IV.E.2.f. (1) or (2), and the Central Board concludes that access at the specific classification category requested is not warranted, the Director shall forward the case to the Secretary of Defense or the Administrator of the

Federal Aviation Agency, or the National Aeronautics and Space Administration as appropriate for determination. The determination shall include a review of any determinations made pursuant to paragraph IV.E.2.f. (2) (b) by any official other than the Secretary or the Administrator.

I. Procedure after final determinations

1. Final determinations reached by the Central Board shall be announced by the Director who shall notify the applicant of the determination in his case. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified of (1) the final conclusion reached, and (2) whether a finding was for or against him with respect to each allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.

2. Final determinations reached by the Secretary of Defense or the Administrator concerned shall be announced by the Director. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified only of (1) the final conclusion reached and (2) whether a finding was for or against him with respect to each allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.

3. Determinations of the Central Board shall be final subject only to:

   a. Reconsideration on its own motion, or at the request of the applicant, addressed through the Director, after it has made a finding that there is newly discovered evidence or that other good cause has been shown;

   b. Reconsideration by the Central Board at the request of the Secretary of Defense, the Secretary of any military department, the Director, or when appropriate, the Administrator concerned.

   c. Reversal by the Secretary of Defense or in agency cases reversal by the Administrator concerned after consultation with the Secretary of Defense.

J. Authority of the Secretary of Defense, and the Administrators, Federal Aviation Agency & National Aeronautics and Space Administration

Nothing contained in this Regulation shall be deemed to limit

or affect the responsibility and powers of the Secretary of Defense or of any Administrator personally, and without respect to this Regulation, to deny or revoke an access authorization in a case affecting his department or agency when he personally determines that the provisions of this Regulation cannot be invoked consistent with the national security and that the security of the nation requires such denial or revocation of access authorization. Such determination shall be conclusive.

V. MISCELLANEOUS

A. Pending Cases

All cases presently pending in the Office of Industrial Personnel Access Authorization Review or before any board constituted under any industrial personnel review program shall be processed under this Regulation unless a Statement of Reasons has been issued in the case and the applicant has been afforded a personal appearance proceeding substantially in accordance with the provisions of this Regulation.

B. Reconsideration of Prior Decisions

1. Decisions rendered under any industrial personnel review program prior to the effective date of this Regulation which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly discovered evidence or that other good cause has been shown. Whenever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

2. In cases where an access authorization has been previously granted and a Department of Defense agency or activity receives additional derogatory information which was not considered by a board at the time it decided the case, such agency or activity, when it is of the opinion, after reviewing the complete file including the record of any prior proceedings, that revocation of said authorization is warranted, shall forward the case to the Director through appropriate channels for referral to the Screening Board in accordance with paragraph IV.B.

C. Monetary Restitution

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel review program. Payments under this provision shall be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.

D. Effective Date

This Directive is effective immediately.

Thomas S. Gates

Secretary of Defense

Enclosure - 1
Executive Order 10865

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SAFEGUARDING CLASSIFIED INFORMATION WITHIN INDUSTRY

WHEREAS it is mandatory that the United States protect itself against hostile or destructive activities by preventing unauthorized disclosures of classified information relating to the national defense; and

WHEREAS it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment; and

WHEREAS I find that the provisions and procedures prescribed by this order are necessary to assure the preservation of the integrity of classified defense information and to protect the national interest; and

WHEREAS I find that those provisions and procedures recognize the interests of individuals affected thereby and provide maximum possible safeguards to protect such interest:

NOW, THEREFORE, under and by virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States and as Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

SECTION 1.(a) The Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, and the Administrator of the Federal Aviation Agency, respectively, shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under this order shall be uniform and provide for full cooperation among the agencies concerned.

(b) Under agreement between the Department of Defense and any other department or agency of the United States, including, but not limited to, those referred to in subsection (c) of this section, regulations prescribed by the Secretary of Defense under subsection (a) of this section may be extended to apply to protect releases (1) of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with such other department or agency, and (2) other releases of classified information to or within industry which such other department or agency has responsibility for safeguarding.

(c) When used in this order, the term "head of a department" means the Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal aviation Agency, and, in sections 4 and 8, includes the Attorney General. The term "department" means the Department of State, the Department of Defense, and the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, and, in sections 4 and 8, includes the Department of Justice.

SECTION 2. An authorization for access to classified information may be granted by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, to an individual, hereinafter termed an "applicant", for a specific classification category only upon a finding that it is clearly consistent with the national interest to do so.

SECTION 3. Except as provided in section 9 of this order, an authorization for access to a specific classification category may not be finally denied or revoked by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, unless the applicant has been given the following:

(1) A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits.

(2) A reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons.

(3) After he has filed under oath or affirmation a written reply to the statement of reasons, the form and sufficiency of which may be prescribed by regulations issued by the head of the department concerned, an opportunity to appear personally before the head of the department concerned or his designee, including, but not limited to, those officials

named in section 8 of this order, for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf.

(4) A reasonable time to prepare for that appearance.

(5) An opportunity to be represented by counsel.

(6) An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant.

(7) A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.

SECTION 4. (a) An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue except that any such statement may be received and considered without affording such opportunity in the circumstances described in either of the following paragraphs:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the head of the department or such special designee has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (B) due to some other cause determined by the head of the department to be good and sufficient.

(b) Whenever procedures under paragraphs (1) or (2) of subsection (a) of this section are used (1) the applicant shall be given a summary of the information which shall be as comprehensive and detailed as the national security permits, (2) appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such person or persons, and (3) a final determination adverse to the applicant shall be made only

by the head of the department based upon his personal review of the case.

SECTION 5. (a) Records compiled in the regular course of business, or other physical evidence other than investigative reports, may be received and considered subject to rebuttal without authenticating witnesses, provided that such information has been furnished to the department concerned by an investigative agency pursuant to its responsibilities in connection with assisting the head of the department concerned to safeguard classified information within industry pursuant to this order.

(b) Records compiled in the regular course of business, or other physical evidence other than investigative reports, relating to a controverted issue which, because they are classified, may not be inspected by the applicant, may be received and considered provided that: (1) the head of the department concerned or his special designee for that purpose has made a preliminary determination that such physical evidence appears to be material, (2) the head of the department concerned or such designee has made a determination that failure to receive and consider such physical evidence would, in view of the level of access sought, be substantially harmful to the national security, and (3) to the extent that the national security permits, a summary or description of such physical evidence is made available to the applicant. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered. In such instances a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

SECTION 6. Because existing law does not authorize the Department of State, the Department of Defense, or the National Aeronautics and Space Administration to subpoena witnesses, the Secretary of State, the Secretary of Defense, or the Administrator of the National Aeronautics and Space Administration, or his representative, may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided by this order. So far as the national security permits, the head of the investigative agency involved shall cooperate with the Secretary or the Administrator, as the case may be, in identifying persons who have made statements adverse to the applicant and in assisting him in making them available for cross-examination. If a person so invited is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination.

App. 35

EXECUTIVE ORDER 10909
AMENDMENT OF EXECUTIVE ORDER NO. 10865, SAFEGUARDING CLASSIFIED INFORMATION WITHIN INDUSTRY

By virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States, and as Commander in Chief of the armed forces of the United States, Executive Order No. 10865 of February 20, 1960 (25 F.R. 1583), is hereby amended as follows:

Section 1. Section 1(c) is amended to read as follows:

"(c) When used in this order, the term 'head of a department' means the Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, the head of any other department or agency of the United States with which the Department of Defense makes an agreement under subsection (b) of this section, and, in sections 4 and 8, includes the Attorney General. The term 'department' means the Department of State, the Department of Defense, the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, any other department or agency of the United States with which the Department of Defense makes an agreement under subsection (b) of this section, and, in sections 4 and 8, includes the Department of Justice."

Sec. 2. Section 6 is amended to read as follows:

"Sec. 6. The Secretary of State, the Secretary of Defense, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, or his representative, or the head of any other department or agency of the United States with which the Department of Defense makes an agreement under section 1(b), or his representative, may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided by this order. Whenever a witness is so invited or requested to appear and testify at a proceeding and the witness is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, and the proceeding involves the activity in connection with which the witness is employed, travel expenses and per diem are authorized as provided by the Standardized Government Travel Regulations or the Joint Travel Regulations, as appropriate. In all other cases (including non-Government employees as well as officers or employees of the executive branch of the Government or members of the armed forces of the United States not covered by the foregoing sentence), transportation in kind and reimbursement for actual expenses are authorized in an amount not to exceed the amount payable under Standardized Government Travel Regulations. An officer or employee of the executive branch of the Government or a member of the armed forces of the United States who is invited or requested to appear pursuant to this paragraph shall be deemed to be in the performance of his official duties. So far as the national security permits, the head of the

investigative agency involved shall cooperate with the Secretary, the Administrator, or the head of the other department or agency, as the case may be, in identifying persons who have made statements adverse to the applicant and in assisting him in making them available for cross-examination. If a person so invited is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination."

Sec. 3. Section 8 is amended by striking out the word "or" at the end of clause (5), by striking out the period at the end of clause (6) and inserting "; or" in place thereof, and by adding the following new clause at the end thereof:

"(7) the deputy of that department, or the principal assistant to the head of that department, as the case may be, in the case of authority vested in the head of a department or agency of the United States with which the Department of Defense makes an agreement under section 1(b)."

DWIGHT D. EISENHOWER

THE WHITE HOUSE

January 17, 1961.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,076

JAMES J. TAGLIA,

Appellant

v.

MELVIN R. LAIRD,
Secretary of Defense,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADDENDA TO BRIEF FOR APPELLANT

ROBERT SHERIFFS MOSS
1815 H Street, N.W.
Washington, D.C. 20006

Attorney for Appellant

Washington D C THIEL PRESS 202 393 0625

ADDENDUM 1 July 28, 1960
NUMBER 5220.6

ASD(MP&R)

Department of Defense Directive

SUBJECT Industrial Personnel Access Authorization Review Regulation

Reference: (a) DOD Directive 5220.6, entitled "Industrial Personnel Security Review Regulation," dated February 2, 1955, as amended (cancelled)

I. GENERAL

A. Authority

This Regulation is issued pursuant to the authority vested by law, including Executive Order 10865 (reproduced as Appendix A), in the Secretary of Defense.

By an exchange of letters between the Secretary of Defense and the Administrators of the Federal Aviation Agency and the National Aeronautics and Space Administration, and as provided for in Section 1 (b), Executive Order 10865, the Department of Defense has been authorized to act for and in behalf of the Federal Aviation Agency and the National Aeronautics and Space Administration in the performance of the administrative and personnel services set forth in this Regulation. Reference (a) is hereby cancelled.

B. Purpose

1. The Secretary of Defense and the Administrators of the Federal Aviation Agency, and the National Aeronautics and Space Administration have prescribed specific requirements, restrictions, and other safeguards which they consider necessary to protect (a) releases of classified information to or within United States industry that relate to bids, negotiations, awards, or the performance or termination of contracts with their department or agency, and (b) other releases of classified information to or within industry which their department or agency has responsibility for safeguarding. In this connection, this Regulation prescribes uniform standards,

criteria, and procedures for processing to final determination all cases which come within the scope of the Industrial Personnel Access Authorization Review Program.

2. Pursuant to the agreement made between the Department of Defense, and the Federal Aviation Agency, and the National Aeronautics and Space Administration, (provided for in Section 1 (b), Executive Order 10865), this Regulation has been extended to apply to protect the releases of classified information specified in subparagraph 1., above. The Boards and instrumentalities provided for in this Regulation are hereby authorized to assume jurisdiction over, and as hereinafter provided, to process and make determinations in cases arising out of such releases of classified information.

3. This Regulation is issued to conform the Industrial Personnel Access Authorization Review Program to the requirements of Executive Order 10865.

C. Definitions

1. Whenever the words "Department of Defense", or "Department of Defense agency or activity", or "military department" are used herein, they shall be deemed to include where applicable the Federal Aviation Agency, or the National Aeronautics and Space Administration.

2. Access Authorization: An authorization to have access to one or more categories of information classified in accordance with Executive Order 10501. (NOTE: Actual access, when authorized, requires both an access authorization and a "need to know".) In the case of a contractor, an "access authorization" is an authorization for the contractor involved to have access to specific categories of classified information provided such access is (a) required in connection with the bidding, negotiation, award, performance, or termination of contracts with a Department of Defense agency or activity or (b) required in connection with other releases of classified information to or within industry. In the case of a contractor employee, an "access authorization" is an authorization for the employee to have access to specific categories of classified information provided such access is (1) required for the performance of his work with a particular contractor on contracts with a Department of Defense agency or activity or (2) required in connection with the release of classified information to or within industry.

3. Administrator: The Administrator of the Federal Aviation Agency, or the National Aeronautics and Space Administration.

4. Agency case: A case arising out of the release of classified information to or within industry directly by the Federal Aviation Agency or the National Aeronautics and Space Administration in connection with the bidding, negotiation, award, or performance or termination of a contract by one of those agencies.

5. Applicant: Any person who is eligible to have the matter of granting, revoking, or denying him an access authorization determined or reconsidered under the Industrial Personnel Access Authorization Review Program as provided for in paragraphs I.F. and V.B.

6. Contractor: An industrial, educational, commercial, or other entity which has executed a contract or a Department of Defense Security Agreement (DD Form 441) with a Department of Defense agency or activity.

7. Personal appearance proceeding: A proceeding before the New York, Washington, or Los Angeles Industrial Personnel Access Authorization Field Board convened and conducted in accordance with this Regulation. The use of the terms "personal appearance proceeding" or "proceeding" in this Regulation does not imply, and shall not be construed to mean, that such procedures are subject to the provisions of the Administrative Procedure Act, or that the rules of evidence customary in the courts of the United States shall be applied.

D. Policy

1. The responsibilities of the Department of Defense, including those imposed by the President in Executive Order 10865, necessitate application of policies designed to minimize the possibility of compromise incident to placing classified information in the hands of industry. Adequate measures will be taken to insure that no person is granted, or is allowed to retain, an authorization for access to classified information unless the available information justifies a finding that such access authorization, at the specific classification category granted, is clearly consistent with the national interest.

2. A determination that granting or retaining authorization for access to information of a specific classification category is not clearly consistent with the national interest shall result in denying or revoking authorization for such access. Any determination under this Regulation adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the

loyalty of the applicant concerned. A determination under this Regulation favorable to an applicant is not, in and of itself, an access authorization; nor is it in any sense a determination that the applicant concerned actually requires access to classified information. Since an access authorization relates only to access to classified information, denying or revoking such an authorization does not preclude participation in unclassified work.

3. In the absence of the power to subpoena witnesses, the Secretary of Defense, through the Director, Office of Industrial Personnel Access Authorization Review, may issue in appropriate cases invitations and requests to appear and testify, and may defray reasonable and necessary expenses incurred by such witnesses, in order that the applicant may have the opportunity for cross-examination provided by this Regulation. So far as the national security permits, investigative agencies under the control of the Department of Defense shall cooperate by identifying to the Office of Industrial Personnel Access Authorization Review, persons who have made statements adverse to the applicant and by assisting in making such persons available for cross-examination.

4. All personnel involved in the processing of cases under the Industrial Personnel Access Authorization Review Program shall comply with the applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, shall be disclosed to any applicant, or to his counsel or representatives, or to any other person not authorized to have access to such information. In cases involving individual applicants, the employer concerned may be advised only of the final determination in the case and of any interim decision to suspend an access authorization previously granted. Except at the written request of the applicant, the Department of Defense shall not release copies of the Statement of Reasons or findings relative thereto outside of the Executive Branch of the Government.

E. Program

The Industrial Personnel Access Authorization Review Program is hereby revised, modified, and continued in accordance with this Regulation. The Program shall be administered by the Director, Office of Industrial Personnel Access Authorization Review, who shall have a staff for that purpose. The Office

of Industrial Personnel Access Authorization Review shall consist of the following elements:

1. The Office of the Director.

2. The Industrial Personnel Access Authorization Screening Board (hereinafter called the Screening Board).

3. The Industrial Personnel Access Authorization Field Boards (hereinafter called the Field Boards).

4. The Central Industrial Personnel Access Authorization Board (hereinafter called the Central Board).

F. Scope of Program

1. Except as provided in subparagraph d. of this paragraph the procedures established in this Regulation shall be applicable to cases in which the applicant is eligible under the Armed Forces Industrial Security Regulation for consideration as to the granting or continuing of an access authorization and in addition thereto:

a. A Department of Defense agency or activity has recommended that an access authorization of a contractor or contractor employee be denied or revoked;

b. A Department of Defense agency or activity has suspended an access authorization of a contractor or contractor employee;

c. A Department of Defense agency or activity has denied or withdrawn a temporary access authorization from an individual, other than a foreign national, who falls within such categories as may be established under this subparagraph; or

d. Action is requested by the Secretary of Defense, or the Secretary of any military department or the Administrator concerned.

2. Once access authorization has been suspended, or a Statement of Reasons has been issued, or a temporary authorization for access has been withdrawn or denied in the case of applicants included in categories established under subparagraph 1., above, these procedures may be invoked by an applicant even though his employment has been terminated.

II. ORGANIZATION

A. Office of Industrial Personnel Access Authorization Review

1. Organization

a. The Office of Industrial Personnel Access Authorization Review shall be established in the Office of the Secretary of Defense and will function under the administrative jurisdiction of the Assistant Secretary of Defense (MP&R). The Office shall be headed by a civilian Director appointed by the Secretary of Defense after consultation with the Assistant Secretary of Defense (MP&R) and the Secretaries of the Army, Navy and Air Force. Policy guidance for the operation of the program including manpower and personnel requirements shall be provided by the Assistant Secretary of Defense (MP&R). The Director shall be responsible for administering the Industrial Personnel Access Authorization Review Program, including its constituent boards; he shall advise and consult with the Secretaries of the Army, Navy and Air Force in carrying out this responsibility. He shall be responsible for ensuring that the Screening, Field and Central Boards are provided with such advice, assistance and personnel, including legal and security advice, as he considers necessary to enable these elements properly to carry out their functions under this Program. He shall have such professional, technical, and clerical staff as he may require to carry out his responsibilities, as set out herein, and such other related responsibilities as may be prescribed. The Director is authorized to obtain information, assistance, and advice directly from any agency or activity of the Department of Defense, and, in accordance with established policies, from other agencies of the Government. He shall prepare monthly reports showing caseloads and the status of pending cases. The Director may issue such supplemental instructions, not inconsistent with this Regulation, as may be desirable for the administration and efficient operation of this Program, including rules for the processing of cases, the conduct of screenings, personal appearance proceedings, determinations and reviews, and for guidance in the application of the standard and criteria set forth in paragraph III. In any particular case, the Director may request additional investigation to be made subject to the provisions of any agreements with investigative agencies outside the Department of Defense.

b. The Office of Industrial Personnel Access Authorization Review shall be located in the Pentagon and shall be

supported administratively by the Office of the Secretary of Defense. The military departments shall make appropriate allocations of funds, military and civilian personnel, and personnel spaces.

c. Communications shall be addressed to the Director, Office of Industrial Personnel Access Authorization Review, The Pentagon, Washington 25, D. C.

2. Department Counsel

The Office of Industrial Personnel Access Authorization Review shall include within its staff a sufficient number of qualified attorneys, who may be stationed in Washington, D. C. or at such other locations as the Director may select, to act as counsel for the Department of Defense in each case in which a personal appearance proceeding is held under this Regulation. When designated by the Director to serve in this capacity, department counsel shall perform the functions normally and customarily associated with said position. Department counsel shall also advise and assist the Screening Board as required, and shall represent the Department of Defense before the Central Board when appropriate.

3. Files

The complete files of all review cases pertaining to industrial personnel shall be maintained by the Department of the Army.

B. Industrial Personnel Access Authorization Screening Board

1. The Screening Board shall be located in the Office of Industrial Personnel Access Authorization Review and shall be responsible for the performance of the duties and functions hereinafter prescribed.

2. The Secretary of each military department shall appoint one or more members, military or civilian, to the Screening Board as the caseload requires. Appropriate officials designated by each Secretary will submit nominations through the Director, who will review the qualifications of each nominee and make an appropriate recommendation to the Secretary concerned. Except as provided in paragraph II.F., any three members so appointed, one from each military department, shall constitute a quorum-panel so that more than one panel may be convened at the same time. The Director shall designate one member to serve as Chairman of the Screening Board.

3. The Screening Board shall have jurisdiction over all cases which are referred to it in accordance with this Regulation.

C. Industrial Personnel Access Authorization Field Boards

1. There shall be three field boards, which shall be known as the New York, the Washington and the Los Angeles Industrial Personnel Access Authorization Field Boards and which shall be located in said cities. Additional field boards may be established by the Director with the approval of the Secretaries of the Army, Navy and Air Force. Panels of existing Field Boards may be convened at other locations to provide prompt and convenient personal appearance proceedings. Each Field Board shall be responsible for the performance of the duties and functions hereinafter prescribed.

2. The Secretary of each military department shall appoint one or more members, military or civilian, to each Field Board as the caseload requires. Appropriate officials designated by each Secretary will submit nominations through the Director, who will review the qualifications of each nominee and make an appropriate recommendation to the Secretary concerned. The Director shall designate either one member of the Board or a staff member to serve as administrative director of each Board who will be responsible for the immediate operations of the Board. A quorum-panel may consist of any one civilian member who is a qualified attorney, or of any three members, one from each military department, of whom at least one shall be a civilian and at least one shall be a qualified attorney. When a panel of three members is convened, the administrative director shall designate one member to act as Chairman. A quorum-panel may exercise all of the authority conferred on the Board or Chairman by this Regulation.

3. Each Field Board will have jurisdiction over all cases referred to it in accordance with this Regulation.

D. Responsibilities of Military Departments for Administrative Support

1. Except as provided in paragraph 2., the Field Boards shall be supported administratively by the following military departments, which shall appoint such other personnel as may be required by the Director to assist each Field Board:

New York Industrial Personnel Access Authorization Field Board
Department of the Army

Washington Industrial Personnel Access Authorization Field Board
Department of the Air Force

Los Angeles Industrial Personnel Access Authorization FieldBoard
Department of the Navy

2. Whenever, pursuant to direction of the Director, a panel of a Field Board established under paragraph II.C.1., above, is convened at any of the following named locations, the commanders named, respectively, shall arrange or provide for the administrative support needed by such board panel in order to discharge its official business at such locations:

Alaska:
Commander, Alaskan Air Command

Virgin Islands, Canal Zone, and Puerto Rico:
Commanding General, USA, Carribean

Guam, American Samoa, Wake, Midway, Guano Island & Hawaii:
Commandant, 14th Naval District

3. Where a panel of a Field Board is convened at a location other than its principal office or at a location outside the jurisdiction of the commanders named in paragraph 2., above, the military department requested by the Director shall provide office space, facilities and clerical personnel for each personal appearance proceeding and for the prompt making of a verbatim transcript thereof.

4. As a verbatim transcript will be required of each personal appearance proceeding before a Field Board, it is the responsibility of each of the above mentioned commanders to provide the necessary personnel and facilities for the prompt making of such transcripts.

E. Central Industrial Personnel Access Authorization Board

1. There is hereby established a Central Board, which shall be located in the Office of Industrial Personnel Access Authorization Review, and shall be responsible for the performance of the duties and functions hereinafter prescribed.

2. The Secretary of each military department shall appoint one or more members, military or civilian, to the Central Board as the caseload requires. Appropriate officials designated by each Secretary will submit nominations through the Director, who will review the qualifications of each nominee and make an appropriate recommendation to the Secretary concerned. The Director shall designate one member to serve as Chairman of the Central Board. Except as provided in paragraph II.F., any three members so appointed, one from each military department, shall constitute a quorum-panel so that more than one panel may be convened at the same time. One of the members of each quorum-panel must be a qualified lawyer and each quorum-panel shall include at least one civilian.

3. The Central Board shall have jurisdiction over all cases referred to it in accordance with this Regulation.

F. Composition of Boards in Agency Cases

1. Whenever an agency case is referred for consideration and determination under the Program the Administrators concerned shall be entitled to appoint one member to the Screening Board and two members to the Central Board. Such appointments shall conform to the requirements of paragraph II.G. of this Regulation.

2. Whenever an agency case is referred to the Screening or Central Boards, the Director shall notify the Administrator concerned thereof. The Administrator, or his designee, shall, in their absolute discretion, exercise or waive the right of his agency to be represented on the Board involved and shall notify the Director thereof in writing, which notification shall be made a permanent part of the record in the case. If the right is exercised, the Screening Board panel to which the case is referred shall consist of four members and the Central Board panel of five members, instead of the usual three members; if it is waived the Board shall be constituted as provided in paragraphs II.B. or II.E., above.

G. Access Authorization of Nominees

No person shall be appointed Director, board member, or staff member under this Program until such person has been granted an authorization for access to Top Secret information, or its equivalent, based on a background investigation.

III. STANDARD AND CRITERIA

A. Standard for Issuing an Access Authorization

Authorization for access to classified information of a specific classification category shall be granted or continued only if it is determined that such access by the applicant is clearly consistent with the national interest.

B. Criteria for Application of Standard in Cases Involving Individuals

1. Commission of any act of sabotage, espionage, treason, or sedition or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason or sedition.

2. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, revolutionist, or with an espionage agent or other secret representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.

3. Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of Government of the United States by unconstitutional means.

4. Membership in, or affiliation or sympathetic association with, or participation in the activities of any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist, or subversive, or which has adopted or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means.

5. Intentional, unauthorized disclosure to any person of classified information, or of other information, disclosure of which is prohibited by law.

6. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

7. Participation in the activities of an organization established as a front for an organization referred to in subparagraph 4., above, under circumstances indicating that his personal views were sympathetic to the subversive purposes of such organization.

8. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.

9. Sympathetic interest in totalitarian, fascist, communist, or similar subversive movements.

10. Sympathetic association with a member, or members, of an organization referred to in subparagraph 4., above.

(Ordinarily, this will not include chance or occasional meetings, nor contacts limited to normal business or official relations.)

11. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in subparagraphs 1. through 9., above. A close continuing association may be deemed to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with such person.

12. Close continuing association of the type described in subparagraph 11., above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

13. Willful violation or disregard of security regulations.

14. Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

15. Any deliberate misrepresentations, falsifications or omission of material facts from a Personnel Security Questionnaire, Personal History Statement, or similar document.

16. Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

17. Acts of a reckless, irresponsible or wanton nature which indicate such poor judgment and instability as to suggest that the individual might disclose classified information to unauthorized persons, or otherwise assist such persons, whether deliberately or inadvertently, in activities inimical to the national interest.

18. Any illness, including any mental condition, of a nature which, in the opinion of competent medical authority, may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

19. Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may be likely to cause action contrary to the national interest.

20. The presence of a spouse, parent, brother, sister, or offspring in a nation whose interests may be inimical to the interests of the United States, or in satellites or occupied areas of

such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such relatives which may be likely to cause action contrary to the national interest.

21. Refusal by the individual, without satisfactory subsequent explanation, to answer questions before a Congressional or legislative committee, or Federal or State court or other tribunal, regarding charges of his alleged disloyalty or other misconduct.

C. Guidance for the Application of the Standard and Criteria

1. The activities and associations listed in paragraph III.B., above, describe conduct which may, in the light of all the surrounding circumstances, be the basis for denying or revoking an access authorization. The conduct varies in implication, degree of seriousness and significance depending upon all the factors in a particular case. Therefore, the ultimate determination of whether an authorization should be granted or continued must be an over-all common-sense one on the basis of all the information which may properly be considered under this Regulation including but not restricted to such factors, when appropriate, as the following: the seriousness of the conduct, its implications, its recency, the motivations for it, the extent to which it was voluntary and undertaken with knowledge of the circumstances involved and, to the extent that it can be estimated and is appropriate in a particular case, the probability that it will continue in the future.

2. Legitimate labor activities shall not be considered in determining whether access authorization should be granted or continued.

3. It is essential to the efficient, economical, and equitable operation not only of the Industrial Personnel Access Authorization Review Program, but of the total procedures whereby the Department of Defense authorizes access to classified information, that applicants provide full, frank and truthful answers when they complete official questionnaires or other similar documents, or respond to official inquiries. Accordingly, the deliberate giving of false or misleading testimony or information on relevant matters, may be sufficient standing alone to justify denying or revoking access authorization and shall be weighed carefully before a determination is reached under this Program.

4. The granting or continuing of an authorization for access to a contractor is not clearly consistent with the national interest if the access authorization of an owner, officer,

director, or any executive of the contractor who is required to have such an access authorization, has not been, or would not be, granted under the standard and criteria set forth in paragraphs III.A. and III.B., above.

IV. PROCESSING OF CASES

A. Emergency Action

Department of Defense activities or agencies may not make a final determination denying or revoking an authorization for access. In exceptional cases officials authorized by the military department concerned may suspend an authorization previously granted to an individual (but not to a facility) when, in the opinion of the authorized official, the individual's continued access to classified information, pending action by the Screening Board, would constitute an immediate threat to the national interest. Any such suspension action shall be reviewed by the Screening Board to determine its propriety.

B. Forwarding Cases

Department of Defense activities or agencies shall forward to the Director all cases prescribed in paragraph I.F.1 together with the complete file, including the recommendation in the case, the reasons therefor, and all other available information and material relevant to a determination. After ensuring that the file has been properly prepared and transmitted, the Director shall forward it to the Screening Board for appropriate action.

C. Initial Adjudication Procedures (Screening Board Action)

1. The Screening Board shall review each case referred to it by the Director and shall determine in accordance with the standard and criteria set forth in paragraph III whether the reported information warrants (a) authorizing or continuing to authorize access at the specific classification category requested or (b) further processing as set forth below.

2. With respect to any case pending before it, the Screening Board may request the Director to:

   a. Request further investigation, specifying the particular points on which the Board feels its information is not adequate.

   b. Issue to the applicant such written interrogatories as the Board may deem desirable.

   c. Arrange for an interview with the applicant.

d. Arrange for an interview with any witness who has given information relevant to a decision in the case.

3. The Screening Board may, with respect to any case pending before it, determine at any time that an existing authorization shall be suspended. Upon any such determination, the Director shall notify the applicant, the contractor, the office of the cognizant military department and the agency or activity which forwarded the case to him.

4. If the Screening Board determines that access at the specific classification category requested should be granted or continued in effect, it shall prepare its determination in accordance with the instructions set out in subparagraph 9., below. The Director shall notify the agency or activity which forwarded the case to him of the determination and instruct it to effect the authorization where appropriate. The Screening Board shall reconsider its determination at the request of the Secretary of Defense, the Secretary of a military department, or the Administrator concerned.

5. If the Screening Board concludes on the basis of the information available to it and in accordance with the standard and criteria set forth in paragraph III that the case does not warrant a determination favorable to the applicant, it shall prepare a Statement of Reasons informing the applicant of the grounds upon which his access authorization may be denied or revoked. This Statement of Reasons shall be as comprehensive and detailed as the national security permits. At the time a Statement of Reasons is issued, any access authorization previously granted for Secret or Top Secret shall be suspended or limited to Confidential unless such access authorization was granted pursuant to board action under any industrial personnel review program in which case the Screening Board shall determine whether the access authorization should be suspended or limited. The Screening Board shall also determine whether any access authorization previously granted for Confidential should be suspended or limited.

6. The Director shall forward the Statement of Reasons and a copy of this Regulation to the applicant and shall inform him of the status of his access authorization pending a final determination. An applicant who has been served with a Statement of Reasons and who has filed under oath or affirmation a written reply thereto which complies with the requirements of paragraph IV.C.7 shall be afforded:

a. An opportunity to appear personally before a Field Board for the purpose of supporting his eligibility for access authorization and of presenting evidence on his own behalf.

b. A reasonable time to prepare for that appearance.

c. An opportunity to be represented by counsel without cost to the Government.

d. The opportunity to cross-examine adverse witnesses prescribed in paragraph IV.E.2.

7. Before an applicant is afforded an opportunity to make a personal appearance before a Field Board he must submit a detailed written answer under oath or affirmation specifically admitting, denying or disclaiming knowledge of each allegation and each supporting fact alleged in the Statement of Reasons. The applicant's answer must either admit or deny each allegation or supporting fact, giving such explanation as may be available to him, or disclaim knowledge thereof. A general denial or other similar answer is not sufficient. The applicant must set out his position with sufficient particularity to disclose the basis thereof, in order that the Department of Defense may determine in advance of the personal appearance proceeding whether the allegations and supporting facts are wholly denied, denied in part, or wholly admitted and make arrangements to produce such information in support as may be required. The Director may decline to accept answers which do not meet the above requirements and, upon notice to the applicant, may refuse to continue to process his application. In that event, the Director shall suspend any access authorization then in effect and give appropriate notice. In the alternative, the Director may forward the case to a Field Board which may treat allegations or supporting facts with respect to which the Director finds the answer is insufficient as established for the purpose of making a determination under this Program.

8. Where the applicant:

a. Files an answer which complies with subparagraph 7. and requests a personal appearance proceeding, or where, although the answer is insufficient, the Director elects to proceed as provided for in said subparagraph, the Director shall assign the case to a Field Board for a proceeding.

b. Files an answer which complies with subparagraph 7., but elects not to request a personal appearance proceeding, the Director shall assign the case to the Central Board for determination on the basis of all available information including the answer and all documents in support thereof.

c. Does not answer, the Director shall instruct the department which forwarded the case to deny or revoke access authorization, as appropriate, and shall advise the applicant.

9. All determinations by the Screening Board shall be made in executive session. A determination to grant or continue access authorization shall be by unanimous vote. No person other than members of the Board shall be present when the Board deliberates and reaches its determination.

10. Decisions adverse to the applicant announced by the Director in accordance with paragraph IV.C.8.c. may be reconsidered by the Screening Board at the request of the Director, or at the request of the applicant addressed through the Director, after a finding by the Screening Board that there is newly discovered evidence or that other good cause has been shown.

D. Personal Appearance

1. Promptly after being notified by the Director that a case has been referred for a personal appearance proceeding, the Chairman of the Field Board shall set a time and place for the proceeding and inform the applicant thereof. Personal appearance proceedings shall be held as soon as practicable, allowing the applicant and the Department of Defense a reasonable time to prepare. Postponements may be granted by the Chairman in his sound discretion upon application by either party with notice to the other.

2. Normally, a personal appearance proceeding shall be held at the home office of the Field Board concerned. When the applicant so requests and when in the discretion of the Chairman equity to him requires that the proceeding be held in a different place, or when the interests of the Government would be served thereby, Field Boards, subject to the over-all authority of the Director, may arrange to convene at such times and places as will best meet the above objectives.

3. It is to the advantage of both the applicant and the Department to shorten and simplify the proceedings before the Field Board by stating the issues and arriving at an agreed-upon version of the facts in the case when it is possible to do so. Department counsel is authorized to consult directly with the applicant, or if he has counsel or representative, with them, for purposes of reaching mutual agreement upon arrangements for an expeditious proceeding in the case. Such arrangements may include clarification of issues, and stipulations with respect to testimony and the contents of documents and other

physical evidence. Such stipulations when entered into shall be binding upon the applicant and the Department of Defense for the purpose of these proceedings.

4. The applicant is responsible for producing witnesses in his own behalf or presenting other evidence before the Field Board to support his reply to the Statement of Reasons. When specific assistance is requested, however, the department counsel and the Chairman of the Field Board may provide such assistance, upon a showing that it is practicable and necessary. In the Chairman's sound discretion, invitations to attend the proceeding as witnesses in the applicant's behalf, or requests for specific documents or other physical evidence, may be tendered upon application, provided a showing of the necessity for such assistance has been made.

5. Department counsel is responsible for producing at the proceeding witnesses and information relied upon by the Department to establish those facts alleged in the Statement of Reasons which have been controverted. Every reasonable and practicable effort shall be made to obtain witnesses and to facilitate their appearance in accordance with the policy set out in paragraph I.D.3. When requested all Department of Defense agencies and activities shall cooperate in carrying out this policy.

6. Where an applicant who has requested an opportunity to appear fails without sufficient reason therefore to appear at the time and place set for the proceeding, or at any postponement thereof, and has not requested that his case be determined on the basis of all available information including any written material he may have submitted, the Field Board shall return the case to the Director without further action. The Director shall then take action under paragraph IV.C.8.c.

E. Procedures for Personal Appearance Proceedings

1. General Provisions

a. Personal appearance proceedings are designed to ascertain all the relevant facts in a case to aid in reaching fair and impartial determinations. Such proceedings are not to be conducted with the formality of a court proceeding or of an administrative hearing conducted under the Administrative Procedure Act, but rather as administrative inquiries held for the purpose of affording the person concerned an opportunity to appear for the purpose of supporting his eligibility for an access authorization and to permit the Department of Defense to inquire fully into the matters related to the particular case. As

provided in paragraph IV.E.2.a., the customary rules of evidence shall not be controlling.

b. Personal appearance proceedings conducted under this Regulation are not adversary in nature. Nevertheless, a careful and searching inquiry into the facts is necessary if the objectives of this Regulation are to be effectuated. Field Boards shall be alert to the necessity for identifying and resolving disputed issues of fact whenever possible and shall make their rulings with these considerations in mind.

c. Personal appearance proceedings shall be conducted in an orderly manner and in an atmosphere of dignity and decorum. They may be attended only by the members of the Field Board, the applicant and his counsel or representatives, authorized personnel of the Department of Defense and necessary clerical personnel. Unless the Chairman of the Field Board rules otherwise, a witness may be present only when he is testifying.

d. The Director shall designate a qualified attorney to represent the Department of Defense and to act as department counsel in each case. He shall represent the Department, and shall be responsible for making a complete record and for placing before the Field Board all material which may properly be incorporated therein. He shall question Department of Defense witnesses and cross-examine witnesses produced by the applicant, although the Field Board may also question any witness.

e. After the proceeding has been convened, and the Statement of Reasons and the applicant's answer thereto have been entered into the record, normally the applicant shall have the right to make a general opening statement either in person or by counsel, and to present his case. He may call witnesses, testify in his own behalf if he so desires and present documents, or other information, in support of his application for access authorization, and cross-examine witnesses produced by the Department of Defense.

f. Witnesses before the Field Board shall testify subject to the provisions of Sec. 1001, Title 18, U.S. Code. Before testifying they shall be informed that said section makes it a criminal offense punishable by a maximum of five years imprisonment, $10,000 fine, or both, knowingly and willfully to make a false statement

or representation to any department or agency of the United States as to any matter within the jurisdiction of any department or agency of the United States. Written interrogatories must be sworn to before a notary public or other official authorized to administer oaths.

g. When appropriate the Field Board shall amend the Statement of Reasons to conform it with the information available and enter the amendment into the record. When such amendments are made, the Chairman of the Field Board shall grant the applicant such additional time as, in his sound discretion, he deems appropriate to answer such amendments and to secure and present evidence pertaining thereto.

h. The Field Board may recess the proceeding at any time at the request of the applicant or his counsel, department counsel, or upon its own motion.

i. Before the Chairman of the Field Board adjourns the proceeding, he shall ask the applicant whether he desires additional time to secure and present additional evidence or to submit a brief. If the applicant desires to present such additional material, the Field Board shall determine the time within which it must be presented and the form in which it will be received. The Chairman shall also advise the applicant that announcement of the determination in his case will be made by the Director, Office of Industrial Personnel Access Authorization Review.

j. A verbatim transcript (in triplicate) shall be made of the proceedings and such transcript shall become a permanent part of the record. The transcript shall not include information introduced in accordance with the provisions of paragraph IV.E.2.e. and f., below. The applicant or his designated representative shall be furnished without cost one copy of the transcript, less the exhibits, upon his request. The transcript shall be reviewed by the Board prior to release to ensure that it contains no classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants.

k. If the applicant or his counsel desires to submit corrections in the transcript to the Field Board, he shall note the corrections on a separate statement designating the page and line. The statement of corrections must be filed within the time set by the Field Board which shall determine what corrections are allowable, shall enter on the transcript by marginal notation the corrections which are allowed, and shall

enter on the statement filed by the applicant the corrections which are rejected. This statement shall be made a permanent part of the record. The Chairman of the Field Board in his discretion may call upon the applicant or his counsel for a discussion of the corrections. Corrections shall be allowed solely for the purpose of conforming the transcript to the actual testimony.

1. Whenever the Field Board concludes with respect to an issue of fact that the investigation is inadequate or that all of the information has not been fully developed or explored, it may request that further investigation be conducted and in appropriate cases may recess the proceeding pending such investigation. Such requests shall be addressed to the Director through the department counsel. Information developed through supplemental investigation shall be made available to the Board in the same manner as information developed in the original investigation.

2. Introduction of Information

a. The record shall consist exclusively of all information presented by the Department of Defense in accordance with this Regulation, together with all information submitted by the applicant. The record shall not be limited to evidence admissible in the courts of the United States. Any oral or documentary evidence may be received if otherwise admissible under this Regulation and accorded the weight deemed appropriate, but irrelevant, immaterial or unduly repetitious material may be excluded, in the sound discretion of the Chairman of the Field Board. Efforts shall be made to obtain the best evidence available.

b. Unless permitted by paragraphs e. and f., below, the record may contain no information adverse to the applicant on any controverted issue unless (1) the information or its substance has been made available to the applicant and he offers no objection to its presentation; or (2) the information or its substance is made available to him and the applicant is afforded an opportunity to cross-examine the person providing the information either orally or by written interrogatories. The foregoing shall not apply to information bearing upon the characterization in the Statement of Reasons of any organization or individual other than the applicant. Information the admission of which is not prohibited by this paragraph, or by any other provision of this Regulation, may be received and made part of the record and may be considered by any board or official charged with making determinations under this Regulation.

c. Prior to the referral of a case to a Field Board for a personal appearance proceeding, the Director, Office of Industrial Personnel Access Authorization Review, upon application by either the applicant or the department counsel, shall rule whether, in the light of all the circumstances, testimony shall be taken personally, by deposition, or through cross-interrogatories. In making this ruling, the Director shall exercise his sound discretion and shall state his reasons therefor. He may direct the applicant or his counsel, and department counsel to frame written interrogatories and upon application by either party shall rule upon the relevancy and materiality of any question to be incorporated therein. Once the case has been referred to the Field Board, the Chairman of the Field Board shall perform this function. Any action taken by the Director under this paragraph shall be reflected in the record where appropriate.

d. Notwithstanding any other provision of this Regulation, records compiled in the regular course of business, or other physical evidence other than investigative reports as such, may be received and considered subject to rebuttal without authenticating witnesses, provided such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense or the Administrator of the Federal Aviation Agency or the National Aeronautics and Spece Administration to safeguard classified information within industry pursuant to Executive Order 10865. Such documents shall be exhibited to the applicant and when received by the Field Board shall be made a part of the record in the case.

e. Records compiled in the regular course of business, or other physical evidence other than investigative reports as such, relating to a controverted issue, which, because they are classified, may not be inspected by the applicant, may be received and considered provided that (1) the Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that purpose pursuant to Section 5,(b), Executive Order 10865, has made a preliminary determination that said physical evidence appears to be material, and that failure to receive and consider it would, in view of the level of access sought, be substantially harmful to

the national security, and (2) to the extent that the national security permits, a summary or description of said physical evidence shall be made available to the applicant. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered.

f. A written or oral statement by a person adverse to the applicant on a controverted issue, and not relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant, may be received and considered without affording an opportunity to cross-examine the person making the statement only in circumstances described in either of the following subparagraphs, provided however, that a summary of the statement as comprehensive and detailed as the national security permits shall be made available to the applicant:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that particular purpose pursuant to Section 4 (a),(2), of Executive Order 10865, has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (a) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (b) due to some other cause

determined by the Secretary or the Deputy Secretary of Defense, or when appropriate, by the Administrator or Deputy Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration to be good and sufficient.

g. A written or oral statement of a person relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant may be received and considered without affording the applicant an opportunity to cross-examine the person making the statement, irrespective of whether the statement is adverse to the applicant or relates to a controverted issue, provided the applicant is given notice that it has been received and may be considered by the Board, and is informed of its contents to the extent permitted by paragraph I.D.4., above.

h. Whenever information is made a part of the record under the exceptions authorized by subparagraphs e. or f. (1) or (2), the record shall contain certificates evidencing that the determinations required therein have been made. Such certificates shall include the reasons therefor and shall be made available to the applicant unless their disclosure is prohibited by paragraph I.D.4., above.

i. In any case where information is received by the Field Board pursuant to subparagraphs e. or f. (1) or (2), a final determination adverse to the applicant in a Department of Defense case shall be made only by the Secretary of Defense, and in an agency case by the Administrator of the Federal Aviation Agency or of the National Aeronautics and Space Administration, as appropriate, based upon their personal review of the case.

F. Field Board's Report

1. As promptly as possible after the proceeding and after full consideration of the record and of any arguments made or briefs submitted, the Field Board shall prepare a report which shall include a recommended decision in the case, prepared in accordance with the standard and criteria set forth in paragraph III. The Field Board's report shall contain a recitation of the questions presented, a summary of the evidence received, findings of fact with respect to each allegation made, and its conclusion on each question presented for consideration. The Field Board's report shall be forwarded through the Director to the Central Industrial Personnel Access Authorization Board. The report shall not be made available to the applicant.

2. Whenever an applicant has made a personal appearance before a Field Board, a decision adverse to him may be made only on grounds stated in the Statement of Reasons and any amendments thereto and must be based upon a record that is in conformity with Executive Order 10865 and this Regulation. A Field Board or the Central Board may not receive or consider any information with respect to any fact in issue, unless such information is made available to such Board in accordance with this Regulation.

3. In every case where applicable, the Field Board shall give appropriate consideration to the fact that the applicant did not have the opportunity to inspect classified information or to identify or cross-examine persons constituting sources of information. It shall also give appropriate consideration to whether information was given under oath or affirmation, and whether or not the person concerned has had an opportunity to rebut it. In every case where classified physical evidence is involved, information as to the authenticity and accuracy of said physical evidence furnished by the investigative agency shall be considered.

G. Action by the Central Industrial Personnel Access Authorization Board

1. Whenever a case is referred to the Central Board, it shall make a final determination subject to the provisions of paragraph IV.I.3. in cases which do not fall within the provisions of paragraphs IV.E.2.e. or IV.E.2.f. (1) or (2), specifying the specific category of classified information to which access shall be granted or continued where appropriate.

2. In cases where the provisions of paragraphs IV.E.2.e. or IV.E.2.f. (1) or (2) apply, the Central Board shall (a) prepare a final determination where the decision is to grant or continue access at the specific classification category requested, or (b) where it concludes that access at that specific classification category is not warranted, it shall so notify the Director.

3. Before the Central Board makes a final decision, it shall take the following action, as applicable:

a. If the Board reaches a tentative decision adverse to the applicant, it shall, through the Director, give

notice thereof to the applicant together with notice of its proposed findings for or against him with respect to each allegation in the Statement of Reasons, and shall provide him with an opportunity to make an appearance before it, in person or by counsel, or to file a written brief. Within ten (10) calendar days after his receipt of such notice, the applicant may file with the Board a written notice of intention to appear or to file a written brief. If the applicant files such written notice of intention, the Board shall fix as early a date as practicable for filing a written brief or making a personal appearance before it, and, through the Director, shall give notice thereof to both the applicant and department counsel and at the same time shall furnish department counsel with copies of the tentative decision and proposed findings as previously furnished to the applicant.

b. If the Board reaches a tentative decision favorable to the applicant it shall, through the Director, give notice thereof to the department counsel together with notice of its proposed findings for or against the applicant with respect to each allegation in the Statement of Reasons, and shall provide department counsel with an opportunity to make an appearance before it, or to file a written brief. Within ten (10) calendar days after receipt of this notice, department counsel may file with the Board a written notice of intention to appear or to file a written brief. If department counsel files such written notice of intention, the Board shall fix as early a date as practicable for filing written brief or making personal appearance before it, and, through the Director, shall give notice thereof to both department counsel and the applicant and at the same time shall furnish the applicant with copies of the tentative decision and proposed findings as previously furnished to department counsel.

c. Personal appearances before the Central Board and written briefs filed with the Central Board are intended to permit the applicant and department counsel to present their positions based exclusively upon the record made before the Field Board, and shall not be used as a substitute for proceedings before such a Board. Argument may be made, but witnesses shall not be heard and testimony shall not be taken.

d. Under a. and b., above, when the applicant or department counsel, as the case may be, has filed a written notice

of intention, the other shall be entitled at the designated time to appear personally or file a written brief as he may prefer. Failure by him to utilize this opportunity shall be deemed a waiver thereof.

e. After the applicant and department counsel have submitted written briefs or appeared before the Central Board, as provided in subparagraphs a. and b., above, the Board shall reach a final determination in all cases in which it is authorized to do so, and shall refer all other cases to the Director for action by him in accordance with paragraph H., below. If the applicant under subparagraph a., above, or department counsel under subparagraph b., above, fails to file written notice of intention, or fails, after filing such notice, to appear or file a written brief in a timely manner, the tentative decision of the Board shall automatically become final in all cases in which the Board is authorized to make a final determination and notice thereof shall be given in accordance with paragraph I., below; in all other cases the tentative decision shall be referred to the Director for action by him in accordance with paragraph H., below.

4. In reaching a determination or conclusion as hereinabove provided, the Central Board may adopt, modify or reverse the findings, conclusion, or recommendation of the Field Board, or may request further investigation or may return the case through the Director to the Field Board with instructions to take further testimony or conduct other proceedings. In each case it shall consider the matters set out in paragraph IV.F.3., above.

5. In cases in which it is authorized to reach a final determination, the Central Board shall prepare an opinion which shall include an analysis of the evidence, findings of fact and the reasoning on which the determination is based. The determination shall be reached by majority vote, shall be signed by the members, and made a permanent part of the record in the case. If a determination is not unanimous, a minority opinion shall be filed.

H. Action by the Secretary of Defense or the Administrators

Whenever a case falls within the provisions of paragraphs IV.E.2.e. or IV.E.2.f. (1) or (2), and the Central Board concludes that access at the specific classification category requested is not warranted, the Director shall forward the case to the Secretary of Defense or the Administrator of the

Federal Aviation Agency, or the National Aeronautics and Space Administration as appropriate for determination. The determination shall include a review of any determinations made pursuant to paragraph IV.E.2.f. (2) (b) by any official other than the Secretary or the Administrator.

I. Procedure after final determinations

1. Final determinations reached by the Central Board shall be announced by the Director who shall notify the applicant of the determination in his case. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified of (1) the final conclusion reached, and (2) whether a finding was for or against him with respect to each allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.

2. Final determinations reached by the Secretary of Defense or the Administrator concerned shall be announced by the Director. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified only of (1) the final conclusion reached and (2) whether a finding was for or against him with respect to each allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.

3. Determinations of the Central Board shall be final subject only to:

   a. Reconsideration on its own motion, or at the request of the applicant, addressed through the Director, after it has made a finding that there is newly discovered evidence or that other good cause has been shown;

   b. Reconsideration by the Central Board at the request of the Secretary of Defense, the Secretary of any military department, the Director, or when appropriate, the Administrator concerned.

   c. Reversal by the Secretary of Defense or in agency cases reversal by the Administrator concerned after consultation with the Secretary of Defense.

J. Authority of the Secretary of Defense, and the Administrators, Federal Aviation Agency & National Aeronautics and Space Administration

Nothing contained in this Regulation shall be deemed to limit

or affect the responsibility and powers of the Secretary of Defense or of any Administrator personally, and without respect to this Regulation, to deny or revoke an access authorization in a case affecting his department or agency when be personally determines that the provisions of this Regulation cannot be invoked consistent with the national security and that the security of the nation requires such denial or revocation of access authorization. Such determination shall be conclusive.

V. MISCELLANEOUS

A. Pending Cases

All cases presently pending in the Office of Industrial Personnel Access Authorization Review or before any board constituted under any industrial personnel review program shall be processed under this Regulation unless a Statement of Reasons has been issued in the case and the applicant has been afforded a personal appearance proceeding substantially in accordance with the provisions of this Regulation.

B. Reconsideration of Prior Decisions

1. Decisions rendered under any industrial personnel review program prior to the effective date of this Regulation which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly discovered evidence or that other good cause has been shown. Whenever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

2. In cases where an access authorization has been previously granted and a Department of Defense agency or activity receives additional derogatory information which was not considered by a board at the time it decided the case, such agency or activity, when it is of the opinion, after reviewing the complete file including the record of any prior proceedings, that revocation of said authorization is warranted, shall forward the case to the Director through appropriate channels for referral to the Screening Board in accordance with paragraph IV.B.

C. Monetary Restitution

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel review program. Payments under this provision shall be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.

D. Effective Date

This Directive is effective immediately.

Thomas S. Gates
Secretary of Defense

Enclosure - 1
Executive Order 10865

EXECUTIVE ORDER 10865

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SAFEGUARDING CLASSIFIED INFORMATION WITHIN INDUSTRY

WHEREAS it is mandatory that the United States protect itself against hostile or destructive activities by preventing unauthorized disclosures of classified information relating to the national defense; and

WHEREAS it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment; and

WHEREAS I find that the provisions and procedures prescribed by this order are necessary to assure the preservation of the integrity of classified defense information and to protect the national interest; and

WHEREAS I find that those provisions and procedures recognize the interests of individuals affected thereby and provide maximum possible safeguards to protect such interest:

NOW, THEREFORE, under and by virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States and as Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

SECTION 1.(a) The Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, and the Administrator of the Federal Aviation Agency, respectively, shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under this order shall be uniform and provide for full cooperation among the agencies concerned.

(b) Under agreement between the Department of Defense and any other department or agency of the United States, including, but not limited to, those referred to in subsection (c) of this section, regulations prescribed by the Secretary of Defense under subsection (a) of this section may be extended to apply to protect releases (1) of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with such other department or agency, and (2) other releases of classified information to or within industry which such other department or agency has responsibility for safeguarding.

(c) When used in this order, the term "head of a department" means the Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, and, in sections 4 and 8, includes the Attorney General. The term "department" means the Department of State, the Department of Defense, and the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, and, in sections 4 and 8, includes the Department of Justice.

SECTION 2. An authorization for access to classified information may be granted by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, to an individual, hereinafter termed an "applicant", for a specific classification category only upon a finding that it is clearly consistent with the national interest to do so.

SECTION 3. Except as provided in section 9 of this order, an authorization for access to a specific classification category may not be finally denied or revoked by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, unless the applicant has been given the following:

(1) A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits.

(2) A reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons.

(3) After he has filed under oath or affirmation a written reply to the statement of reasons, the form and sufficiency of which may be prescribed by regulations issued by the head of the department concerned, an opportunity to appear personally before the head of the department concerned or his designee, including, but not limited to, those officials

named in section 8 of this order, for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf.

(4) A reasonable time to prepare for that appearance.

(5) An opportunity to be represented by counsel.

(6) An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant.

(7) A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.

SECTION 4. (a) An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue except that any such statement may be received and considered without affording such opportunity in the circumstances described in either of the following paragraphs:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the head of the department or such special designee has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (B) due to some other cause determined by the head of the department to be good and sufficient.

(b) Whenever procedures under paragraphs (1) or (2) of subsection (a) of this section are used (1) the applicant shall be given a summary of the information which shall be as comprehensive and detailed as the national security permits, (2) appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such person or persons, and (3) a final determination adverse to the applicant shall be made only

by the head of the department based upon his personal review of the case.

SECTION 5. (a) Records compiled in the regular course of business, or other physical evidence other than investigative reports, may be received and considered subject to rebuttal without authenticating witnesses, provided that such information has been furnished to the department concerned by an investigative agency pursuant to its responsibilities in connection with assisting the head of the department concerned to safeguard classified information within industry pursuant to this order.

(b) Records compiled in the regular course of business, or other physical evidence other than investigative reports, relating to a controverted issue which, because they are classified, may not be inspected by the applicant, may be received and considered provided that: (1) the head of the department concerned or his special designee for that purpose has made a preliminary determination that such physical evidence appears to be material, (2) the head of the department concerned or such designee has made a determination that failure to receive and consider such physical evidence would, in view of the level of access sought, be substantially harmful to the national security, and (3) to the extent that the national security permits, a summary or description of such physical evidence is made available to the applicant. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered. In such instances a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

SECTION 6. Because existing law does not authorize the Department of State, the Department of Defense, or the National Aeronautics and Space Administration to subpoena witnesses, the Secretary of State, the Secretary of Defense, or the Administrator of the National Aeronautics and Space Administration, or his representative, may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided by this order. So far as the national security permits, the head of the investigative agency involved shall cooperate with the Secretary or the Administrator, as the case may be, in identifying persons who have made statements adverse to the applicant and in assisting him in making them available for cross-examination. If a person so invited is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination.

SECTION 7. Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.

SECTION 8. Except as otherwise specified in the preceding provisions of this order, any authority vested in the head of a department by this order may be delegated to the

(1) Under Secretary of State or a Deputy Under Secretary of State, in the case of authority vested in the Secretary of State;

(2) Deputy Secretary of Defense or an Assistant Secretary of Defense, in the case of authority vested in the Secretary of Defense;

(3) General Manager of the Atomic Energy Commission, in the case of authority vested in the Commissioners of the Atomic Energy Commission;

(4) Deputy Administrator of the National Aeronautics and Space Administration, in the case of authority vested in the Administrator of the National Aeronautics and Space Administration;

(5) Deputy Administrator of the Federal Aviation Agency, in the case of authority vested in the Administrator of the Federal Aviation Agency; or

(6) Deputy Attorney General or an Assistant Attorney General, in the case of authority vested in the Attorney General.

SECTION 9. Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires. Such authority may not be delegated and may be exercised only when the head of a department determines that the procedures prescribed in sections 3, 4, and 5 cannot be invoked consistently with the national security and such determination shall be conclusive.

DWIGHT D. EISENHOWER

THE WHITE HOUSE
February 20, 1960

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APPENDIX "A"

EXECUTIVE ORDER 10909

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AMENDMENT OF EXECUTIVE ORDER NO. 10865, SAFEGUARDING CLASSIFIED INFORMATION WITHIN INDUSTRY

By virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States, and as Commander in Chief of the armed forces of the United States, Executive Order No. 10865 of February 20, 1960 (25 F.R. 1583), is hereby amended as follows:

Section 1. Section 1(c) is amended to read as follows:

"(c) When used in this order, the term 'head of a department' means the Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, the head of any other department or agency of the United States with which the Department of Defense makes an agreement under subsection (b) of this section, and, in sections 4 and 8, includes the Attorney General. The term 'department' means the Department of State, the Department of Defense, the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, any other department or agency of the United States with which the Department of Defense makes an agreement under subsection (b) of this section, and, in sections 4 and 8, includes the Department of Justice."

Sec. 2. Section 6 is amended to read as follows:

"Sec. 6. The Secretary of State, the Secretary of Defense, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, or his representative, or the head of any other department or agency of the United States with which the Department of Defense makes an agreement under section 1(b), or his representative, may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided by this order. Whenever a witness is so invited or requested to appear and testify at a proceeding and the witness is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, and the proceeding involves the activity in connection with which the witness is employed, travel expenses and per diem are authorized as provided by the Standardized Government Travel Regulations or the Joint Travel Regulations, as appropriate. In all other cases (including non-Government employees as well as officers or employees of the executive branch of the Government or members of the armed forces of the United States not covered by the foregoing sentence), transportation in kind and reimbursement for actual expenses are authorized in an amount not to exceed the amount payable under Standardized Government Travel Regulations. An officer or employee of the executive branch of the Government or a member of the armed forces of the United States who is invited or requested to appear pursuant to this paragraph shall be deemed to be in the performance of his official duties. So far as the national security permits, the head of the

investigative agency involved shall cooperate with the Secretary, the Administrator, or the head of the other department or agency, as the case may be, in identifying persons who have made statements adverse to the applicant and in assisting him in making them available for cross-examination. If a person so invited is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination."

Sec. 3. Section 8 is amended by striking out the word "or" at the end of clause (5), by striking out the period at the end of clause (6) and inserting "; or" in place thereof, and by adding the following new clause at the end thereof:

"(7) the deputy of that department, or the principal assistant to the head of that department, as the case may be, in the case of authority vested in the head of a department or agency of the United States with which the Department of Defense makes an agreement under section 1(b)."

DWIGHT D. EISENHOWER

THE WHITE HOUSE

January 17, 1961.

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ADDENDUM 2

INDEX TO
PROCEDURAL MATTERS

PROCEDURAL MATTERS

1. Motion to Produce Witnesses and Documents (1-49, Attachments 1 and 2)

a. Poole Letter

Inasmuch as the Philco Corporation refused to furnish the Poole letter in response to requests by the Department and Counsel for the Applicants, Counsel for the Applicants abandoned that part of his Motion. (32) Renewed requests with negative results. (T. 52-54, 63-69)

b. Complete Berry Memorandum

Because the Government furnished Counsel for the Applicants with an excerpt of the memorandum (Gov. Ex. A-2) and because Department Counsel stated that the excerpt represented the only copy of the memorandum that the Government had, Counsel for the Applicants accepted that representation. (32)

c. The January Document

Counsel for the Applicants accepted the Government's position that the Government did not have the document available. (32)

d. Document B

Counsel for the Applicants submitted to the Field Board the question of production of Document B. Department Counsel represented to the Board, through his reply to the Motion to Produce, that Document B was in the possession of the Government, was classified at the level of Secret, and would not be released to Counsel for the Applicants although a witness would appear at the proceeding who would testify as to the general nature of the contents of the document and its classification. Counsel for the Applicants and Department Counsel were notified that the Motion as to Document B was denied. (67)

e. Motion to Produce From FBI Statements of Witnesses

Counsel for the Applicants desired the production of any statements made to the FBI by fifteen named persons. Department Counsel represented that he would endeavor to produce as many of the statements as the Department of Justice would release for use in situations analogous to those governed by

the so-called Jencks Statute and Rule. Because of the representation of Department Counsel and because of the impotency of the Board in the area, that part of the Motion was denied. (33, 67)

f. and g. Abandoned by Counsel for the Applicants because of recognition of the inability of Department Counsel to accomplish the action requested. (26, 33)

The Motion also contained a request for the production of certain named witnesses. Department Counsel agreed to assist Counsel for the Applicants in their efforts to obtain the presence of witnesses at the proceeding. (33-36) Elsewhere in the record, it is reflected that both Department Counsel and the Field Board furnished the cooperation requested.

2. Motion for Consolidation (Attachments 3, 4 and 5)

The Motion was filed by Department Counsel and an Opposition Reply was submitted by Counsel for the Applicants. From this joinder, there arose a stipulation which provided, in essence, that the evidence presented in the Becker proceeding would, insofar as it might pertain to Taglia, be considered as having been obtained by deposition and be incorporated in the Taglia proceeding. (66)

3. Motion to Produce Document B

Document B cannot be made available. (142)

4. Motion to Return Case to Department of Defense

Counsel for the Applicants moved that the Examiner report the case of Becker back to the Department of Defense because there could not be accorded to Becker the protections granted to him by Section 3 of Executive Order 10865 in that ---

1. Full opportunity to cross-examine persons who had made oral or written statements adverse to the Applicant had been denied.

2. Berry attained refuge behind the claimed attorney-client privilege and refused to produce the Poole letter and the full text of the memorandum of the meetings at Philco on August 22, 1962.

3. Philco witnesses, other than Berry, refused to produce the Poole letter and the full text of the memorandum of the meetings of August 22, 1962.

4. Poole refused to submit to cross-examination concerning the July 17, 1962 letter or to answer any questions with respect to it.

The Motion in all its aspects was denied. (1233)

5. Motion to Dismiss So Much of the Statement of Reasons as Refers to Document B Insofar as Becker Might be Concerned

The Motion was denied. (1233)

6. Witnesses Present with Personal Counsel

Discussion was had concerning whether witnesses might have counsel present with them when they testified. (63-64, 66) A ruling was made that attorneys appearing with witnesses might be considered as alter egos and might consult with their clients though they might not participate in any part of the proceeding. Counsel for the Applicants consented to the presence of attorneys with witnesses. (76) Later, the same Counsel withdrew that consent. (118) It was subsequently ruled that the witness might have his attorney present for the purpose of consultation with him. (199-203, 211-216) Counsel for the Applicants renewed their opposition to counsel being present with witnesses and the prior ruling was adhered to. (1955) The ruling was applied when Transue testified and Attorney Wolf was present during his testimony. (219) Attorney Wolf was also present during the testimony of Bailey (745) and of Beck and Jones. Attorney Mackall was present during the testimony of Poole. (770, 1041)

7. Declination to Identify Confidential Informants

FBI Agent Byrnes declined to disclose the name of an individual who called the Federal Bureau of Investigation, the result of the call being an interview of Mrs. Poole by Byrnes. It was ruled that the Examiner could not instruct, request nor direct the witness to answer a question concerning the identification of the caller if the witness took the position that that identity was a confidential matter which he could not disclose. (171-179)

8. Refusal of Witnesses to Answer Questions

a. Upon advice of counsel, Poole refused to answer any questions with reference to the letter dated July 17, 1962 and sent by her to Transue. (1044) Counsel for Poole explained his position for the record. (1053-1061) Elsewhere Poole refused to answer questions on the advice of counsel. (1061) It was ruled that the Examiner had no authority to direct the witness to answer questions.

b. Berry refused to answer questions as to the contents of the Poole letter or to testify as to the August 22, 1962 memorandum beyond the extract which was entered into evidence, asserting the existence of a relationship of attorney and client between him and the Philco Corporation as to those documents and as of the time he acquired his knowledge of them and their contents. (518-524, 528-529, 537, 557-561, 563, 575, 580, 626) The position of Berry was honored by the Examiner.

9. Refusal of Witnesses to Produce Documents

a. Upon the advice of counsel, Poole declined to produce a copy of her June 19, 1962 Notice to Philco of intent to resign. It was ruled that it was irrelevant and immaterial in this particular proceeding as to whether the witness did or did not produce a copy of the notice. (104, 1007)

b. Beck, after consultation with counsel, re-expressed the Philco position that the Poole letter and the complete Berry memorandum would not be produced at the proceeding. (1885-1886)

c. Counsel for the Applicants requested that the Examiner instruct the witness Transue to furnish a copy of the report which he submitted to Philco Corporation concerning the January and March incidents. Transue testified he had turned the report over to the Philco Corporation and did not have it in his possession. The request of Counsel was denied. (339-341)

d. Jones testified that he did not have the Transue report and that as far as he was concerned the Philco Corporation would not produce it. (1978-1980)

e. On frequent occasions, Counsel for the Applicants sought to have witnesses produce the full Berry memorandum. Upon their refusal to do so, the Examiner denied requests of that Counsel that the Examiner instruct the witnesses to produce the full memorandum. (438-441, 482-491, 504, 528, 1227)

10. Hearsay

On several occasions during the proceeding, the question of the admissibility of hearsay evidence was raised. In admitting some and declining to admit other, this Examiner was guided by relevancy, materiality and possible repetition. (91-92, 97, 420, 437, 635, 1106, 2246-2252) On the pages

last cited, there is reflected an effort by Counsel for the Applicants to have Becker testify as to the contents of the Poole letter, which he had never seen. It was ruled that, while the contents of the Poole letter might have some pertinency to the civil suits of the Applicants against Poole, its contents were irrelevant in this proceeding and Becker was not permitted to testify as to the purported contents.

11. Conduct and Comments of Counsel

a. Both Department Counsel and Counsel for the Applicants described the conduct of the other as being objectionable. (520-521)

b. Request of Counsel for the Applicants that Poole be again reminded of the provisions of Section 1001, Title 18, U. S. Code was denied because the provision had already been read to the witness. (1043)

c. There was a statement by Counsel for the Applicants that Department Counsel was putting words in the mouth of Poole. (1085)

d. Following comment by Department Counsel as to the form of amateur interference by Counsel for the Applicants, there was a statement by the latter that the record should indicate the theatrical maneuvers of Department Counsel throughout the proceeding. (1145)

e. There was an effort by Applicants' Counsel to refresh recollection of witness when there was no showing that recollection needed refreshing. (1372-1376)

f. Counsel for the Applicants stated that he wanted record to show his objection to the manner of cross-examination by Department Counsel because he was shouting at the witness McGinty and obviously trying to intimidate him. The witness had no such reaction. (1397-1398)

g. Department Counsel objected to effort by Counsel for the Applicants to show through Taglia that certain documents marked "Company Official" were given to him by McGinty at the same time as Document A was given to Taglia when Counsel for the Applicants had failed to inquire in the same area of McGinty. Applicants' Counsel stated that failure to do so was an error and there was no design or scheme in connection with it. (1503-1504)

h. Applicants' Counsel asserted that Department Counsel was trying to intimidate witness Taglia. Overruled because contrary to fact. (1653-1654)

i. Counsel for the Applicants alleged that Department Counsel would try to evade bringing in the Poole letter. (T. 198) The record clearly indicates that Department Counsel made diligent effort to obtain the Poole letter, but the Philco Corporation simply refused to release it.

j. It was requested by Counsel for the Applicants that the witnesses be read the entire contents of Section 1001, Title 18, U. S. Code rather than the paraphrased version contained in the Directive. Granted (432), though shorter version was and is deemed to be adequate.

k. Despite statement by Counsel for the Applicants that he would not accept an "I don't know" answer from Poole, it was ruled that such an answer was responsive. (993-994)

l. It was suggested by Examiner to Counsel for the Applicants that in other than matters of a preliminary nature, Counsel should adhere as much as possible to the customary means of eliciting information from a witness on direct examination and avoid leading questions as much as possible. (1124)

m. Counsel for the Applicants asserted that there must be continual arguments after rulings by the Examiner. (1302)

n. There was admonition by Examiner to both Counsel to refrain from improper comment (397), interruption (1054-1055), inappropriate gratuitous comment (1116), bickering (1118), and quibbling (1304).

12. Criticism of Personal Appearance Proceedings and Security Program

In addition to the Motion described in Item 4 above, Counsel for the Applicants made several comments about personal appearance proceedings and the security program.

a. Applicants' Counsel stated that personal appearance proceeding does not meet requirements of due process. (73, 202)

b. Counsel for the Applicants asserted that the personal appearance proceeding was as much adversary as any he had ever been in. (110) Repeated (1019)

c. Counsel for the Applicants stated that if the Department of Defense wanted to make personal appearance proceedings completely consistent with due process and with the requirements of the Government, they should have sought regulatory or statutory authority for the power of subpoena. (123)

d. Counsel for the Applicants asserted that exposure of Taglia to a personal appearance proceeding was motivated by malice and not by the honest effort of the Department of Defense to determine the appropriateness of access authorization for him. (T. 73)

13. Examiner's Conduct

During the course of the proceedings, Counsel for the Applicants stated for the record his objection to the Examiner's conduct of the proceedings and charged that everything the Examiner had done since the witness Poole was on the stand had been designed to protect the witness. (921) The same Counsel also implied that the rulings of the Examiner were unfairly favorable to the Government. (2658) It may be stated only that it was necessary at the proceeding to confine the reception of evidence to such matter as might be reasonably relevant to the Statement of Reasons. It seemed to this Examiner that Counsel for the Applicants was unable to form or retain a continuing conception of the difference in purposes between a personal appearance proceeding and the civil suits in which he was interested. Any rulings were made under the guidance furnished by the controlling Directive.

14. Repetition

On many occasions during the proceeding, questions arose concerning the repetitious nature of questions and rulings were made with respect thereto. (641-648, 654, 1002, 1011, 1018, 1047, 1051, 1070, 1071, 1081, 1421, 1422)

15. Relevancy

a. It was ruled irrelevant as to whether Poole ever expressed an opinion to Becker that the men in the office shouldn't be engaged in taking care of little petty details, that that was what the secretaries were there for. (1036)

b. It was ruled irrelevant as to how many scissors there were in the Washington office of the Philco Corporation at the time of the so-called scissors incident. (1037)

c. A Motion by Department Counsel to strike as irrelevant testimony of Taglia as to Applicants' Ex. Y

and BB (documents purportedly received by Taglia at the same time he allegedly received Document A) was granted. (1519-1523)

That ruling was later modified as to Applicants' Ex. BB and testimony was received concerning that document. (1532)

The original Motion of Department Counsel to strike the testimony as to Applicants' Ex. Y and BB was withdrawn and it was ruled that any such testimony might remain in the record. (1567)

d. After an objection by Department Counsel on the grounds of irrelevancy to a question posed to Beck by Counsel for the Applicants had been sustained and Counsel for the Applicants expressed a desire to support his contention by stating his grounds for the record, he was advised that he might submit a statement containing his supporting reasons. (2043-2044) No such statement was ever submitted.

e. Counsel for the Applicants stated that he intended to establish that the D. C. Labs incident and its relationship to Mrs. Poole was a complete fabrication on Transue's part. It was ruled that any evidence in that area would be irrelevant in the personal appearance proceeding. (2050-2051)

f. After Beck had testified that he had never seen the Poole letter but stated he had been informed that it contained statements or allegations of personal misconduct by employees of the Philco Washington office, an objection by Department Counsel to his testifying as to what he was told in that area was sustained on the grounds that any such testimony would not reasonably pertain to the Statement of Reasons, and would, therefore, be irrelevant. (1888-1889)

g. Though Counsel for the Applicants was advised that the patriotism of Becker was not a matter before the Board for consideration, that Counsel insisted upon including that word in his reputation type questions to witnesses. (1350)

h. Counsel for the Applicants sought to introduce evidence to show that a television program of January 23, 1963 contained exactly the same kind of information that was in Document B and upon objection, it was ruled that any such evidence would not be relevant to the allegations in the Statement of Reasons. (738-740)

16. Jencks Rule

There was utilized during the proceeding the procedure contemplated in situations analogous to those covered

by the so-called Jencks Rule or Statute. A report properly identified by FBI Agent Gaffney was admitted into evidence as Gov. Ex. D after that excised exhibit was compared with the unexpurgated version of the document and it was found, as represented by Department Counsel, that only certain administrative material had been excised. (669-671)

17. Requests for Appearance of Witnesses and To Hold Proceeding Open Pending Production of Certain Evidence

a. Throughout the proceeding, Counsel for the Applicants made requests for assistance in effecting the presence of witnesses. Department Counsel and Field Board personnel made every effort to comply with requests of that Counsel. It was the decision of that Counsel to call no additional witnesses. (2634, 2751)

b. Counsel for the Applicants requested that the personal appearance proceeding remain open until there could be obtained certain depositions sought with respect to civil suits pending against Mrs. Poole. The request was denied. (2744-2746)

18. Best Evidence

a. The efficiency rating form which Becker made out on Poole in January 1962 was not available and Becker testified as to its contents. (2153-2163, 2167)

b. A photostatic copy of a form showing Poole's Philco Statement of Earnings and Deductions for Week Ending 10 June 1962 was admitted into evidence when identified by Becker as an official Philco Corporation statement for check purposes, the original document having been declared unavailable. (2316-2318)

19. Availability During PAP of Copies of Transcript

Because a long proceeding was anticipated early, this Examiner decided that copies of the transcript would not be made available to either Department Counsel or Counsel for the Applicants until the proceedings had terminated. That decision was based upon the belief that utilization of the transcript by either Counsel would further prolong the proceedings. (2164)